

Form F46 Application to vary a modern award

The Applicant



These are the details of the person who is making the application.

Title	[X] Mr [] Mrs [] Ms [] Other please specify:		
First name(s)	Brian		
Surname	Jeffriess		
Postal address	PO Box 1146		
Suburb	Port Lincoln		
State or territory	South Australia	Postcode	5606
Phone number	0419 840 299	Fax number	
Email address	austuna@bigpond.com		

If the Applicant is a company or organisation please also provide the following details

Legal name of business	Australian Southern Bluefin Tuna (SBT) Industry Association Ltd
Trading name of business	Australian Southern Bluefin Tuna (SBT) Industry Association Ltd
ABN/ACN	99 124 577 448/124 577 448
Contact person	Brian Jeffriess

Does the Applicant need an interpreter?



If the Applicant requires an interpreter (other than a friend or family member) in order to participate in conciliation, a conference or hearing, the Fair Work Commission will provide an interpreter at no cost.

[] Yes—Specify language

[X] No

Does the Applicant require any special assistance at the hearing or conference (e.g. a hearing loop)?

[] Yes— Please specify the assistance required

[X] No

Does the Applicant have a representative?



A representative is a person or business who is representing the Applicant. This might be a lawyer, or a representative from a union or employer association. There is no requirement to

have a representative.

Yes—Provide representative's details below

No

Applicant's representative



These are the details of the person or business who is representing the Applicant.

Name of person	Frank McMahon		
Organisation	McMahon and Associates		
Postal address	508 Station Street		
Suburb	North Carlton		
State or territory	Victoria	Postcode	3054
Phone number	0407305496	Fax number	
Email address	frank@mcmahonandassociates.com.au		

1. Coverage

1.1 What is the name of the modern award to which the application relates?



Include the Award ID/ Code No. of the modern award

The Ports, Harbours and Enclosed Water Vessels Award 2010 [MA000052]

1.2 What industry is the employer in?

Wild Catch Fishing Industry

2. Application

2.1 What are you seeking?

Specify which of the following you would like the Commission to make:

a determination varying a modern award

a modern award

a determination revoking a modern award

2.2 What are the details of your application?

Variations sought to remove an ambiguity or uncertainty, or to correct an error in the Modern Award, are:

2.2.1

In clause 3 definitions insert a new definition 'Wild Catch Fishing Industry' in alphabetical order in the following terms:

“Wild Catch Fishing Industry means the operation of an employer to catch Fish and Other Seafood in their natural environment for commercial purposes. This includes only fish or seafood which have been grown to maturity without human intervention (that is all fish grown on farms are excluded from this definition).”

2.2.2

Insert a new clause 4.7.

New 4.7

“This Award does not cover employees in the Wild Catch Fishing Industry (as defined in Clause 3 of this Award).”

2.2.3 Renumber the existing clause 4.7 as 4.8

2.2.4 Renumber the existing clause 4.8 as 4.9

Attach additional pages, if necessary.

2.3 What are the grounds being relied on?

Using numbered paragraphs, specify the grounds on which you are seeking the proposed variations.



You must outline how the proposed variation etc is necessary in order to achieve the modern awards objective as well as any additional requirements set out in the FW Act.

Grounds for the Variations

1. In *Tenix Defence Pty Ltd (1)* a Full Bench of the AIRC decided that the Commission ‘must first identify an ambiguity or uncertainty’ before it can exercise the discretion to remove the ambiguity or uncertainty. The decision has been referenced in many other matters seeking variations to Modern Awards by the Fair Work Commission (‘the Commission’):

[28] Before the Commission exercises its discretion to vary an agreement pursuant to s.170MD(6)(a) it must first identify an ambiguity or uncertainty. It may then exercise the discretion to remove that ambiguity or uncertainty by varying the agreement.

*[29] The first part of the process – identifying an ambiguity or uncertainty – involves an objective assessment of the words used in the provision under examination. The words used are construed having regard to their context, including where appropriate the relevant parts of a related award. As Munro J observed in *Re Linfox CFMEU (CSR Timber) Enterprise Agreement 1997*:*

“The identification of whether or not a provision in an instrument can be said to contain an ambiguity requires a judgment to be made of whether, on its proper construction, the wording of the relevant provision is susceptible to more than one meaning. Essentially the task requires that the words used in the provision be construed in their context, including where appropriate the relevant parts of the ‘parent’ award with which a complimentary provision is to be read.”

[30] We agree that context is important. Section 170MD(6)(a) is not confined to the identification of a word or words of a clause which give rise to an ambiguity or uncertainty. A combination of clauses may have that effect.

[31] The Commission will generally err on the side of finding an ambiguity or uncertainty where there are rival contentions advanced and an arguable case is made out for more than one contention.

2. The evidence that the coverage clause of the relevant Award is susceptible to more than one meaning can be seen in the documents emanating from the Fair Work Ombudsman (‘FWO’) as set out in Exhibits 1,2 and 3.

¹ [PR917548](#) - *Tenix Defence Pty Limited* - re variation of agreement, ambiguity, or uncertainty - see paragraphs 28 to 31

Exhibit One (as attached)

Details of the statement of claim filed in the Federal Court by the Fair Work Ombudsman on 23/12/2013

Exhibit Two (as attached)

The FWO Letter to the representative of the applicant (14 February 2017) in response to the applicant's submission to the FWO (Exhibit Four).

Exhibit Three (as attached)

'Wild Catch Fishing Statement Coverage' prepared by FWO and provided to the applicant as 'background information for the formal letter to be sent to the applicant on 16 February 2017.

The FWO position on coverage

3. In essence, the FWO statement of claim (Exhibit One) sets out the FWO position in relation to an application for orders against a company 'in respect of contraventions of civil remedy provisions under the FW Act'. The contraventions were in short alleged underpayment of the 9 employees operating two vessels:

- (a) Santo Rocco di Bargnara (Santa Rocco) and
- (b) The Challenge.

(Australian Wild Tuna Pty Ltd ACN 128 760 734 was the operator of the two vessels)

4. In the statement of claim (as agreed between the solicitors involved for the FWO and the owners of the vessels) it is stated amongst other things on page two as below.

"THE FIRST RESPONDENT

The first respondent is and was at all times:

"(d) a national system employer within the meaning of section 14 of the Fair Work Act;
(e) in the Wild Catch Fishing Industry."

A statement that the applicant agrees with.

5. However, in the section (Employees) describing the identities of the employees, each employee is named and it is stated (paragraph 10 of the claim) that each employee that was employed by the respondent was:

a "(b) full time employee

(c) within the classification of deck hand under the Ports, Harbours, and Enclosed Water Vessels Award 2010 (MA000052) (Modern Award)."

A statement that the applicant does not agree with.

The Applicant's position on coverage

6. Exhibit Four sets out the case in support of the applicant's submission, that as employees in

the 'Wild Catch Fishing Industry' the employees are Award Free.

7. The submission is quite lengthy (for which the applicant apologises). This is a consequence of the AIRC decisions in regard to Award coverage of the Wild Catch Fishing industry being considered over almost 2 years.
8. Whilst difficult to summarise the events it is fair to say that over that period the following were milestone events:

Stage One

- (a) the Australian Workers Union submitted to the Full Bench a 'draft Modern Award' covering many aspects of the Seafood related industries and included a number of Wild Catch Fishing tasks/functions.
- (b) The industry had never been covered by an Award and the nature of their work is very different to any other work traditionally covered by Awards (fishers work as 'hunters', as and when, they can successfully catch fish). The Wild Catch Industry presented their evidence of this to the AWU and the AIRC to support their position.
- (c) The AWU accepted that the Wild Catch Fishing Industry had never been covered by an Award and that the nature of their work was not 'similar to any work covered by any other Awards'.
- (d) It was accepted by the AIRC after the AWU withdrawal, that the Wild Catch Fishing Industry had always been award free.

Stage Two

9. Whilst the industrial parties agreed that the Wild Catch Fishing Industry has been traditionally Award Free and believed that was the conclusion of the matter, it soon became clear that the industry could inadvertently find itself subject to the proposed Miscellaneous Award.
10. At the first hearing regarding the Miscellaneous Award attended by the Wild Catch Fishing Industry representatives, after the then President (Guidice J) called for appearances, his Honour asked the representatives why they were present. Once their concerns were made clear, His Honour clearly indicated that this issue would be addressed in the decision and that they were no longer required to attend (in relation to Wild Catch Fishing).
11. A reading of Exhibit Four (which was the applicant's submission to the FWO) will demonstrate the AIRC's position in relation to their acceptance that the Wild Catch Fishing Industry should not be covered by any Award.
12. On the basis of the Full Bench statements in relation to the sectors of the Fishing Industry which had always been award free, the applicant in summary submits that:-
 - (a) The presence of an 'ambiguity or uncertainty' as interpreted by the FWO on the one hand and the applicant on the other hand, is clearly demonstrated in this application.
 - (b) The 'ambiguity or uncertainty' is best addressed by clarifying the coverage of the Ports, Harbours, and Enclosed Water Vessels Award by:-
 - firstly defining the Wild Catch Fishing Industry;
 - clearly excluding the employees working in the Wild Catch Fishing industry from that award.

13. The applicant further submits that the operative date of any such variation should be the date the decision in relation to this application is handed down (S. 165).

Exhibit Four – ASBTIA – Submissions to the Fair Work Ombudsman with relevant support documentation.

Attach additional pages, if necessary.

Signature



If you are completing this form electronically and you do not have an electronic signature you can attach, it is sufficient to type your name in the signature field. You must still complete all the fields below.

Signature	Frank McMahon
Name	Frank McMahon
Date	31 July 2017
Capacity/Position	Business Consultant (Acting as Representative)



Where this form is not being completed and signed by the Applicant, include the name of the person who is completing the form on their behalf in the **Capacity/Position** section.

PLEASE RETAIN A COPY OF THIS FORM FOR YOUR OWN RECORDS

EXHIBIT ONE

EXTRACTS FROM FAIR WORK OMBUDSMAN v AUSTRALIAN WILD

TUNA PTY LTD - STATEMENT OF CLAIM

**IN THE FEDERAL CIRCUIT COURT (FCC)
SYDNEY REGISTRY- FEDERAL CIRCUIT COURT - FEDERAL LAW
FAIR WORK DIVISION** **No: SYG3215/2013**

NOTICE OF FILING

This document was filed electronically in the FEDERAL CIRCUIT COURT (FCC) on 23/12/2013.

DETAILS OF FILING

Document Lodged: Statement of claim
File Number: SYG3215/2013
File Title: Fair Work Ombudsman v Australian Wild Tuna Pty Ltd (ACN 128 760 734)
(Subject to Deed of Company Arrangement) & Anor
District Registry: SYDNEY REGISTRY- FEDERAL CIRCUIT COURT - FEDERAL LAW



Dated: 23/12/2013

Registrar

Stale Byrne

Note

This Notice forms part of the document and contains information that might otherwise appear elsewhere in the document. The Notice must be included in the document served on each party to the proceeding.



IN THE FEDERAL CIRCUIT COURT OF AUSTRALIA
REGISTRY: SYDNEY
FAIR WORK DIVISION

File number:

FAIR WORK OMBUDSMAN
 Applicant

AUSTRALIAN WILD TUNA PTY LTD (ACN 128760734) (SUBJECT TO A DEED OF COMPANY ARRANGEMENT)
 First Respondent

ANGELO MAIORANA
 Second Respondent

STATEMENT OF CLAIM

(Filed in accordance with Rule 4.05(2) (b) of the *Federal Circuit Court Rules 2001*)

THE APPLICANT

1. The applicant is and was at all relevant times:
 - (a) a statutory appointee of the Commonwealth appointed by the Governor General by written instrument pursuant to Division 2 of Part 5-2 of the *Fair Work Act 2009 (Cth)* (**FW Act**);
 - (b) a Fair Work Inspector pursuant to section 701 of the FW Act; and
 - (c) a person with standing under subsection 539(2) of the FW Act to apply for orders in respect of contraventions of civil remedy provisions under the FW Act.

Filed on behalf of	Fair Work Ombudsman, applicant		
Prepared by	Reshma Bargon	Lawyer's code	-
Name of law firm	Office of the Fair Work Ombudsman		
Address for service in Australia	Level 12, 255 Elizabeth Street		
	SYDNEY	State	NSW
		Postcode	2000
Email	reshma.bargon@fwo.gov.au	DX	-
Tel	(02) 8293 4925	Fax	(02) 6204 2023
		Attention	Reshma Bargon

THE FIRST RESPONDENT

2. The First Respondent, Australian Wild Tuna Pty Ltd (ACN 128 760 734) is and was at all relevant times:
 - (a) a proprietary company incorporated under the *Corporations Act 2001 (Cth)*;
 - (b) from 21 October 2013, subject to a deed of company arrangement, and able to be sued in and by its corporate name and style;
 - (c) a constitutional corporation within the meaning of section 12 of the FW Act;
 - (d) a national system employer within the meaning of section 14 of the FW Act;
 - (e) in the wild-catch fishing industry;
 - (f) the operator of the following two ships for the purposes of fishing at sea:
 - i. the Santo Rocco di Bargnara (**Santo Rocco**);
 - ii. the Challenge.
3. The Santo Rocco was at all relevant times:
 - (a) 28.9 meters in length;
 - (b) primarily docked in the State of New South Wales;
 - (c) required to carry any catch of fish back to port at the end of each fishing trip.
4. The Challenge was at all relevant times:
 - (a) 20.4 meters in length;
 - (b) primarily docked in the State of Queensland.
5. From on or around 10 October 2011, the registered office of the First Respondent has been Viisum 5 Torrens Street Braddon ACT 2612.

THE SECOND RESPONDENT

6. The Second Respondent, Mr Angelo Maiorana, was the director of the First Respondent at all material times.
7. The Second Respondent, Mr Angelo Maiorana, was at all material times:
 - (a) a person responsible for the overall direction, management and supervision of the First Respondent's operations in relation to industrial arrangements, setting and adjusting pay rates, and determining wages and conditions of employment;
 - (b) a person who authorised decisions regarding the First Respondent's operations including decisions regarding the employment of staff and employee entitlements;

- (c) by reason of the matters pleaded in paragraph 6 and paragraph 7(a) and (b) above, responsible in a practical sense for ensuring that the First Respondent complied with its legal obligations to its employees under the FW Act.

THE EMPLOYEES

- 8. The First Respondent, is and was at all material times the entity that employed:
 - (a) Jerry Kembuan;
 - (b) Moody Sumanti;
 - (c) Sigit Wintarto;
 - (d) Sri Wenda Kesuma;
 - (e) James Paseki;
 - (f) Marty Pandeiroot;
 - (g) Bob Luntanagan;
 - (h) Ari Bramantyo;
 - (i) Maykel Wawi.

(collectively, **Employees**).
- 9. At all material times the Employees were national system employees within the meaning of section 13 of the FW Act.
- 10. Jerry Kembuan was employed by the First Respondent:
 - (a) from 4 May 2011 to 7 June 2013;
 - (b) as a full time employee;
 - (c) within the classification of Deckhand under the Ports, Harbours and Enclosed Water Vessels Award 2010 MA000052 (**Modern Award**);
 - (d) primarily on the fishing vessel the Santo Rocco;
 - (e) to perform duties including assisting in the operation and steering of the fishing vessel, and assisting with fishing operations on the deck of the fishing vessel;
 - (f) as a Deck Officer pursuant to his written contract of employment with the First Respondent.
- 11. Moody Sumanti was employed by the First Respondent:
 - (a) from 4 May 2011 to 19 June 2013;
 - (b) as a full time employee;
 - (c) within the classification of Engineer under the Modern Award;

- (d) primarily on the fishing vessel the Santo Rocco;
- (e) to perform duties including diagnosing engine and machinery problems aboard the fishing vessel and carrying out maintenance and repairs;
- (f) as a Ship's Engineer pursuant to his written contract of employment with the First Respondent.

12. Sigit Wintarto was employed by the First Respondent:

- (a) on or around 2 May 2011 to 28 April 2013;
- (b) as a full time employee;
- (c) within the classification of Deckhand under the Modern Award;
- (d) primarily on the fishing vessel the Santo Rocco;
- (e) to perform duties including assisting in the operation and steering of the fishing vessel, and assisting with fishing operations on the deck of the fishing vessel;
- (f) as a Deckhand pursuant to his written contract of employment with the First Respondent.

13. Sri Wenda Kesuma was employed by the First Respondent:

- (a) from 30 April 2012 to 30 April 2013;
- (b) as a full time employee;
- (c) within the classification of Deckhand under the Modern Award;
- (d) primarily on the fishing vessel the Challenge from 30 April 2012 until on or around 31 December 2012;
- (e) primarily on the fishing vessel the Santo Rocco from on or around 1 January 2013 until 30 April 2013;
- (f) to perform duties including assisting in the operation and steering of the fishing vessel, and assisting with fishing operations on the deck of the fishing vessel;
- (g) as a Deck Officer pursuant to his written contract of employment with the First Respondent.

14. James Paseki was employed by the First Respondent:

- (a) from 20 September 2011 to 30 June 2013;
- (b) as a full time employee;
- (c) within the classification of Deckhand under the Modern Award;
- (d) primarily on the fishing vessel the Santo Rocco;

- (e) to perform duties including assisting in the operation and steering of the fishing vessel, and assisting with fishing operations on the deck of the fishing vessel;
 - (f) as a Deck Officer pursuant to his written contract of employment with the First Respondent.
15. Marty Pandeiroot was employed by the First Respondent:
- (a) from 26 May 2011 to 7 June 2013;
 - (b) as a full time employee;
 - (c) within the classification of Deckhand under the Modern Award;
 - (d) primarily on the fishing vessel the Challenge;
 - (e) to perform duties including assisting in the operation and steering of the fishing vessel, and assisting with fishing operations on the deck of the fishing vessel;
 - (f) as a Deck Officer pursuant to his written contract of employment with the First Respondent.
16. Bob Luntanagan was employed by the First Respondent:
- (a) from 9 March 2012 to 31 May 2013;
 - (b) as a full time employee;
 - (c) within the classification of Engineer under the Modern Award;
 - (d) primarily on the fishing vessel the Challenge;
 - (e) to perform duties including diagnosing engine and machinery problems aboard the fishing vessel and carrying out maintenance and repairs;
 - (f) as a Ship's Engineer pursuant to his written contract of employment with the First Respondent.
17. Ari Bramantyo was employed by the First Respondent:
- (a) from 25 January 2012 to 30 June 2013;
 - (b) as a full time employee;
 - (c) within the classification of Deckhand under the Modern Award;
 - (d) primarily on the fishing vessel the Challenge;
 - (e) to perform duties including assisting in the operation and steering of the fishing vessel, and assisting with fishing operations on the deck of the fishing vessel;
 - (f) as a Deck Officer pursuant to his written contract of employment with the First Respondent.

18. Maykel Wawi was employed by the First Respondent:
- (a) from 30 April 2012 to 7 June 2013;
 - (b) as a full time employee;
 - (c) within the classification of Engineer under the Modern Award;
 - (d) primarily on the fishing vessel the Santo Rocco;
 - (e) to perform duties including diagnosing engine and machinery problems aboard the fishing vessel and carrying out maintenance and repairs;
 - (f) as a Ship's Engineer pursuant to his written contract of employment with the First Respondent.

The FW Act

19. The First Respondent was at all material times from 1 July 2010 bound by the FW Act.

The Modern Award

20. The First Respondent was at all material times from 1 July 2010 bound by the Modern Award in respect of the employment of the Employees.

Particulars

- A. Under subclause 4.1 of the Modern Award, the Modern Award covers employers throughout Australia in the ports, harbours and enclosed water vessels industry and their employees listed in the classifications in clause 13 of the Modern Award.
 - B. The 'ports, harbours and enclosed vessels industry' is defined in clause 4.1 of the Modern Award to include 'the operation of vessels of any type' within any body of Australian coastline or 'at sea'.
 - C. By reason of the matters pleaded above in paragraph 2, at all material times, the business of the First Respondent fell within the 'ports, harbours and enclosed vessels industry' as defined in subclause 4.1 of the Modern Award.
 - D. By reason of the matters pleaded above in paragraphs 8 to 18, at all material times the Employees were performing work for the First Respondent within classifications of clause 13 of the Modern Award.
21. By reason of the matters pleaded in paragraphs 10, 12 to 15 and 17 above, the following Employees fell within the classification of General Purpose Hand/Deck Hand under the Modern Award:
- (a) Jerry Kembuan;

- (b) Sigit Wintarto;
- (c) Sri Wenda Kesuma;
- (d) James Paseki;
- (e) Marty Pandeiroot;
- (f) Ari Bramantyo.

(collectively, **General Purpose Hands**).

22. By reason of the matters pleaded in paragraphs 11, 16 and 18 above, the following Employees fell within the classification of Engineer under the Modern Award:

- (a) Moody Sumanti;
- (b) Bob Luntanagan;
- (c) Maykel Wawi.

(collectively, **Engineers**).

Transitional Minimum Wage Instruments

23. The First Respondent was at all material times from 1 July 2010 required to pay the Employees in accordance with the transitional arrangements under Schedule A of the Modern Award, being transitional pay rates calculated with reference to the relevant transitional minimum wage instrument.
24. The Australian Pay and Classification Scale (**Pay Scale**) derived from the Federal Minimum Wage (**FMW**) was the relevant transitional minimum wage instrument for the Employees when they were performing work on the Challenge.

Particulars

- A. Pursuant to item 5(3)(b) of Schedule 9 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009(Cth)* (**Transitional Act**), the FMW is a transitional minimum wage instrument.
- B. Pursuant to sub-item 6(1)(b) of Part 3 of Schedule 9 of the Transitional Act, on and from 1 July 2009 the standard FMW covers an employee if under section 194 of the *Workplace Relations Act 1996(Cth)* (**WR Act**) the FMW for the employee was the standard FMW.
- C. Pursuant to section 194 of the WR Act, the FMW for an employee was the standard FMW if the employee was not a junior employee, an employee with a disability, an employee to whom a training arrangement applies or an Australian Pay and Classification Scale piece rate employee.

- D. None of the Employees was a junior employee, an employee with a disability, an employee to whom a training arrangement applied or an Australian Pay and Classification Scale piece rate employee.
 - E. The Applicant refers to and repeats the matters pleaded above in paragraphs 8 to 18.
25. The Pay Scale derived from the NSW Colliers and Small Ships (State) Award AN120365 (**Colliers Pay Scale**) was the relevant transitional minimum wage instrument for the Employees when they were performing work on the Santo Rocco.

Particulars

- A. Pursuant to item 5(3) of Schedule 9 of the Transitional Act a Pay Scale is a transitional minimum wage instrument.
- B. Pursuant to sub-item 6(1) of Part 3 of Schedule 9 of the Transitional Act, on and from 1 July 2009 a Pay Scale covers an employee if the Pay Scale covers the employment of the employees under (amongst other provisions) section 204 and 205 of the WR Act.
- C. Pursuant to section 204 of the WR Act, the question of whether the employment of a particular employee is covered by a particular Pay Scale is determined by reference to the coverage provisions of the Pay Scale.
- D. Under clause 28 of the Colliers Pay Scale, the Colliers Pay Scale applied to able seamen and other classifications employed on colliers and all vessels carrying stone, metal and other materials within the jurisdiction of the Shipping, Sailors, Deep Sea (State) Industrial Committee.
- E. Pursuant to clause 28 of the Colliers Pay Scale the jurisdiction of the Shipping, Sailors, Deep Sea (State) Industrial Committee included sailors, lamp trimmers, greasers, firemen, trimmers and deckhands employed on sea-going vessels in the State.
- F. By reason of the matters pleaded above in paragraph 3(c) the Santo Rocco was used to carry "other materials", namely fish.
- G. By reason of the matters pleaded above in paragraphs 8 to 18, at all material times the Employees who were performing work on the Santo Rocco for the First Respondent were performing work within classifications of clause 28 of the Colliers Pay Scale.
- H. By reason of the matters pleaded above in paragraphs 2(f)(i) and 3(b) the Santo Rocco was a sea-going vessel in the State of New South Wales.

26. The work performed by the Employees on the Santo Rocco fell within the classification of a sailor/ able seaman under the Colliers Pay Scale.

UNDERPAYMENT CONTRAVENTIONS

CONTRAVENTION 1: Underpayment of ordinary hours worked

27. The First Respondent was at all material times required to pay the Employees minimum wage rates in accordance with clause 13 of the Modern Award (as modified by Schedule A).

Work Performed on the Challenge

28. The Modern Award required the First Respondent to pay the Employees for work performed on the Challenge a minimum hourly rate from 1 July 2012 to 30 June 2013 of:
- (a) \$18.24 for General Purpose Hands;
 - (b) \$19.06 for Engineers.

Particulars

- A. By reason of the matters pleaded above at paragraph 24 the relevant transitional wage instrument for the purposes of Schedule A of the Modern Award is the FMW.

Work Performed on the Santo Rocco

29. The Modern Award required the First Respondent to pay the Employees for work performed on the Santo Rocco a minimum hourly rate from 1 July 2012 to 30 June 2013 of:
- (a) \$23.57 for General Purpose Hands;
 - (b) \$24.27 for Engineers.

Particulars

- A. By reason of the matters pleaded above at paragraphs 25 to 26 the relevant transitional wage instrument for the purposes of Schedule A of the Modern Award is the Colliers Pay Scale.

Underpayment of ordinary hours worked

30. The following Employees worked at least 38 ordinary hours per week for each week of their employment with the First Respondent:
- (a) Jerry Kembuan worked for 44 weeks on the Santo Rocco;
 - (b) Moody Sumanti worked for 50 weeks on the Santo Rocco;
 - (c) Sigit Wintarto worked for 43 weeks on the Santo Rocco;

- (d) Sri Wenda Kesuma worked for 26 weeks on the Challenge and for 17 weeks on the Santo Rocco.

(collectively, **SNC Employees**).

31. The First Respondent failed to pay the SNC Employees at least the minimum hourly rate to which they were entitled under the Modern Award for ordinary hours worked.

Particulars

- A. Details of the amounts to which the SNC employees were entitled for ordinary hours worked for the First Respondent from 1 July 2012 to 30 June 2012 and the gross payments made to them by the First Respondent are set out below.

Employee	Award Entitlement	Employer Payments (Gross)	Underpayment of Award Entitlements
Jerry Kembuan	\$39,409.04	\$28,817.94	\$10,591.10
Moody Sumanti	\$46,113.00	\$30,282.23	\$15,830.77
Sigit Winarto	\$38,513.38	\$15,072.46	\$23,440.92
Sri Wenda Kesuma	\$33,247.34	\$20,115.46	\$13,131.88

32. By reason of the matters pleaded in paragraphs 27 to 31 above, the First Respondent:
- (a) contravened a term of a Modern Award, being subclause 13 of the Modern Award; and
 - (b) thereby contravened section 45 of the FW Act, which is a civil remedy provision pursuant to section 539 of the FW Act.

Contravention 2: Failing to pay the Employees their Safety Net Contractual Entitlement to the relevant contractual rate of pay

33. At all relevant times, the SNC Employees had a contractual entitlement to remuneration which exceeded the statutory minimum hourly rate of pay due to each of the SNC Employees (set out at paragraph 28 and 29 above).
34. At all relevant times, the SNC Employees had the following contractual entitlements:
- (a) Jerry Kembuan had a contractual entitlement to an annual salary of \$47,480.00;
 - (b) Moody Sumanti had a contractual entitlement to an annual salary of \$47,480.00;
 - (c) Sigit Wintarto had a contractual entitlement to an annual salary of \$47,480.00;
 - (d) Sri Wenda Kesuma had a contractual entitlement to an annual salary of \$49,330.00.
35. In the financial year from 1 July 2012 to 30 June 2013, the SNC Employees were employed for the First Respondent as follows:
- (a) Jerry Kembuan was employed for 11 months of the year;
 - (b) Moody Sumanti was employed for 11 months of the year;

- (c) Sigit Wintarto was employed for 10 months of the year;
 - (d) Sri Wenda Kesuma was employed for 10 months of the year.
36. The contractual entitlements at paragraph 34 above constituted Safety Net Contractual Entitlements (**SNC Entitlements**) within the meaning of section 12 of the FW Act.
 37. Pursuant to section 542 of the FW Act, the SNC Entitlements are taken to be entitlements of the SNC Employees under the FW Act.
 38. The First Respondent failed to pay the SNC Employees their SNC Entitlements in relation to remuneration.

Particulars

- A. Details of the SNC Employees' SNC Entitlements and the gross payments made to them by the First Respondent are set out below:

Employee	SNC Entitlement	Employer Payments (Gross)	Underpayment of SNC Entitlements
Jerry Kembuan	\$43,523.37	\$28,817.94	\$14,705.39
Moody Sumanti	\$47,480.00	\$30,282.23	\$17,197.77
Sigit Winarto	\$39,566.67	\$15,072.46	\$24,494.21
Sri Wenda Kesuma	\$41,108.33	\$20,115.46	\$20,992.87

Contravention 3: breach of clause 16 of the Modern Award in failing to pay wages at least fortnightly

39. At all material times the First Respondent was required by clause 16 of the Modern Award to pay wages on a weekly or fortnightly basis.
40. The First Respondent failed to pay wages to the SNC Employees on a weekly or fortnightly basis.

Particulars

- A. Details of the dates when payments were made to the SNC Employees and the periods of time between these dates are set out in **Annexure A**.

41. By reason of the matters pleaded in paragraphs 39 to 44 above, the First Respondent:
 - (a) contravened a term of a modern award, being clause 16 of the Modern Award; and
 - (b) thereby, contravened section 45 of the FW Act which is a civil remedy provision pursuant to section 539 of the FW Act.

Contravention 4: breach of subsection 323(1)(c) of the FW Act in failing to pay wages at least monthly

42. The First Respondent was required at all relevant times by subsection 323(1)(c) of the FW Act, subject to any agreed deductions pursuant to subsection 324(1) of the FW Act, to pay the SNC Employees amounts payable to them in relation to the performance of work at least monthly.

Particulars

- A. At all material times, the SNC Employees did not have a permitted deduction arrangement in place within the meaning of subsection 324(1) of the FW Act.

43. The First Respondent failed to pay the SNC Employees amounts payable to them in relation to the performance of work at least monthly.

Particulars

- A. Details of the dates when payments were made to the SNC Employees and the periods of time between these dates are set out in **Annexure A**.

44. By reason of the matters pleaded in paragraphs 42 and 43 above, the First Respondent contravened subsection 323(1)(c) of the FW Act which is a civil remedy provision pursuant to subsection 539 of the FW Act.

Contravention 5: breach of subsection 323(1)(a) of the FW Act in failing to pay wages in full

45. The First Respondent was required at all relevant times by subsection 323(1)(a) of the FW Act, subject to any agreed deductions pursuant to subsection 324(1) of the FW Act, to pay the Employees amounts payable to them in relation to the performance of work in full.

Particulars

- A. At all material times, the SNC Employees did not have a permitted deduction arrangement in place within the meaning of subsection 324(1) of the FW Act.

46. The First Respondent failed to pay the SNC Employees amounts payable to them in relation to the performance of work in full.

Particulars

- A. Details of the cumulative underpayment owed to the SNC Employees by the First Respondent on a monthly basis are set out in Annexure B.

47. By reason of the matters pleaded in paragraphs 45 and 46 above, the First Respondent contravened subsection 323(1)(a) of the FW Act which is a civil remedy provision pursuant to section 539 of the FW Act.

Contravention 6: breach of subsection 535(1) of the FW Act in failing to make and keep employee records

48. Pursuant to subsection 535(1) of the FW Act and the *Fair Work Regulations 2009 (Cth) (FW Regulations)*, at all relevant times the First Respondent was required to make, and keep for 7 years, employee records of the kind prescribed by the FW Regulations in relation to each of the Employees.

Particulars

- A. Pursuant to subsection 535(2) of the FW Act, the records referred to in subsection 535(1) of the FW Act must include any information prescribed by the regulations.
- B. Pursuant to Chapter 3, Part 3-6, Division 3, regulation 3.31(1) of the FW Regulations, the record must be in a legible form and in the English language and in a form that is readily accessible to an Inspector.
- C. The records relating to employees were required to contain the following details:

Provision of the FW Regulations 2009		Required Content
General		
i	3.32(d)	whether employed on a permanent, temporary or casual basis
ii	3.32(e)	date employee's employment began
Pay		
iii	3.33(1)	the rate of remuneration at which the employee is paid, including the gross and net amounts paid, and the deductions made from that remuneration
iv	3.33(3)	if the employee is entitled to be paid a loading, penalty rate, monetary allowance or separately identifiable entitlement the record must set out details of these entitlements.
v	3.34	if the employee is entitled to overtime rates of pay the record must specify the number of overtime hours worked by the employee during each day and when the employee started and ceased working overtime hours.

Leave		
vi	3.36(1)	details of any leave taken and leave balances
Superannuation		
vii	3.37	details of superannuation contributions

49. The First Respondent did not make, and keep for 7 years, employee records pursuant to subsection 535(1) of the FW Act for the Employees during the period from 1 July 2012 to 30 June 2013, or part thereof.
50. By reason of the matters pleaded at paragraphs 48 to 49 above, the First Respondent contravened subsection 535(1) of the FW Act which is a civil remedy provision pursuant to section 539 of the FW Act.

Contravention 7: breach of subsection 536(1) of the FW Act in failing to provide Employees with Payslips

51. Pursuant to subsection 536(1) of the FW Act, at all relevant times the First Respondent was required to give a pay slip to each of the Employees within one day of paying an amount to the Employees in relation to the performance of work.
52. During the period of 1 July 2012 to 30 June 2013, or part thereof, the First Respondent made payments of amounts to the Employees in relation to the performance of work for which it failed to give corresponding pay slips to those Employees within one day of the payment being made.
53. By reason of the matters pleaded in paragraphs 51 and 52 above, the First Respondent contravened subsection 536(1) of the FW Act, which is a civil remedy provision pursuant to section 539 of the FW Act.

TOTAL UNDERPAYMENT BASED ON SAFETY NET CONTRACTUAL ENTITLEMENTS

54. By reason of the matters pleaded in paragraphs 33 to 38 above, the First Respondent underpaid the Employees the total amount of \$77,390.24.

Particulars

- A. Jerry Kembuan was underpaid a total of \$14,705.39 by the First Respondent in relation to his SNC Entitlement to remuneration.
- B. Moody Sumanti was underpaid a total of \$17,197.77 by the First Respondent in relation to his SNC Entitlement to remuneration.

- C. Sigit Wintarto was underpaid a total of \$24,494.21 by the First Respondent in relation to his SNC Entitlement to remuneration.
- D. Sri Wenda Kesuma was underpaid a total of \$20,992.87 by the First Respondent in relation to his SNC Entitlement to remuneration.

ACCESSORIAL LIABILITY OF THE SECOND RESPONDENT


- 55. The applicant refers to and repeats the matters pleaded at paragraphs 6 and 7 above.
- 56. Further to the matters pleaded at paragraphs 6 and 7 above, at all times between 1 July 2012 and 30 June 2013, the Second Respondent:
 - (a) was the sole director and secretary of the First Respondent;
 - (b) was a signatory to the employment contract of each of the Employees;
 - (c) was a person responsible for the management and control of the First Respondent;
 - (d) a person who made decisions on behalf of the First Respondent, or who was ultimately responsible for the First Respondent's decisions, in relation to:
 - (i) payroll;
 - (ii) the terms and conditions upon which Employees would be engaged by the First Respondent;
 - (iii) directing the Employees as to the hours they were required to work;
 - (iv) approving leave;
 - (v) the recruitment or engagement of employees of the First Respondent;
 - (vi) ensuring that the First Respondent met its industrial and employment obligations in relation to the Employees.
- 57. At all material times, the Second Respondent had knowledge that:
 - (a) the SNC Employees were not being paid at least monthly as referred to in paragraphs 42 and 43 above;
 - (b) the SNC Employees were not being paid their full contractual entitlement to their annual salary as referred to in paragraphs 33 to 38 and 45 to 46 above;
 - (c) the Employees were not receiving payslips as referred to in paragraphs 48 to 49 above;
 - (d) the First Respondent was not making and keeping for 7 years employee records of the kind prescribed by the FW Regulations in relation to each of the Employees as referred to in paragraphs 51 to 52 to above.

58. By reason of the facts and matters pleaded in paragraphs 6 and 7 and 55 to 57 above, the Second Respondent was knowingly concerned in, and thus involved in, the First Respondent's contraventions of subsection 323(1)(a), subsection 323(1)(c), subsection 535(1) and subsection 536(1) of the FW Act, which are civil remedy provisions pursuant to section 539 of the FW Act.
59. The Second Respondent is therefore taken, by operation of section 550 of the FW Act, to have committed those contraventions himself.

ORDERS SOUGHT

60. The applicant seeks declarations that the First Respondent contravened the following civil remedy provisions:
- (a) section 45 of the FW Act by virtue of contravening clause 13 of the Modern Award by failing to pay the SNC Employees their minimum hourly rate of pay for all ordinary hours worked.
 - (b) section 45 of the FW Act by virtue of contravening clause 16 of the Modern Award by failing to pay the SNC Employees their wages at least fortnightly.
 - (c) subsection 323(1)(c) of the FW Act by failing to pay the SNC Employees wages at least monthly.
 - (d) subsection 323(1)(a) of the FW Act by failing to pay the SNC Employees wages in full.
 - (e) subsection 535(1) of the FW Act by failing to make and keep for 7 years employee records of the kind prescribed by the FW Regulations in relation to each of the Employees.
 - (f) subsection 536(1) of the FW Act by failing to provide a payslip within one day of paying an amount to the Employee in relation to the performance of work in relation to each of the Employees.
61. A declaration that the Second Respondent was involved within the meaning of section 550 of the FW Act in the contraventions of subsection 323(1)(a), subsection 323(1)(c), subsection 535(1) and subsection 536(1) of the FW Act committed by the First Respondent alleged in paragraphs 42 to 53.
62. Orders that the First Respondent pay penalties pursuant to subsection 546(1) of the FW Act for the contraventions set out in paragraphs 27 to 33 and 39 to 53 above.
63. Orders that the Second Respondent pay penalties pursuant to subsection 546(1) of the FW Act for the contraventions set out in paragraphs 42 to 53 above.
64. Orders that the Court lists the matter for a hearing so that the parties may be heard regarding the persons to whom the First Respondent and Second Respondent are to pay the penalty amounts ordered at paragraph 62 and paragraph 63.

65. Orders that any compensation or penalty amounts ordered to be paid by the First and/or Second Respondent are payable within 28 days.
66. An Order that the applicant have liberty to apply on seven days' notice in the event that any of the preceding orders are not complied with.
67. Such further or other orders as the Court deems fit.



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Janine Webster

Office of the Fair Work Ombudsman

Lawyer for the applicant

Date: 20 December 2013

ANNEXURE A: Table of dates of payments to the SNC Employees by the First Respondent

Jerry Kembuan, SNC entitlement to an annual salary of \$47,480.00			
Date of payments	Gross Payments made by the First Respondent	Days lapsed in excess of a fortnight since date of last payment	Days lapsed in excess of a month since date of last payment
31 July 2012	\$2,966.00	-	-
2 September 2012	\$2,966.00	19 days	2 days
9 October 2013	\$3,497.00	23 days	7 days
1 November 2013	\$3,497.00	7 days	-
7 December 2012	\$3,497.00	23 days	7 days
15 February 2013	\$500.00	57 days	1 month and 9 days
15 March 2013	\$3,477.00	14 days	-
12 April 2013	\$2,147.00	14 days	-
14 May 2013	\$2,777.00	18 days	2 days
24 May 2013	\$3,494.75	10 days	

Moody Sumanti, SNC entitlement to an annual salary of \$47,480.00

Date of payments	Gross Payments made by the First Respondent	Days lapsed in excess of a fortnight since date of last payment	Days lapsed in excess of a month since date of last payment
31 July 2012	\$2,966.00	-	-
31 August 2012	\$100.00	17 days	-
2 September 2012	\$2,966.00	-	-
9 October 2012	\$2,167.73	23 days	7 days
10 October 2012	\$0.00	-	-
1 November 2012	\$3,496.73	8 days	-
12 November 2012	\$4,325.77	-	-
14 March 2013	\$2,147.00	108 days	3 months and 2 days
3 April 2013	\$2,147.00	6 days	-
18 April 2013	\$200.00	1 day	-
14 May 2013	\$2,777.00	12 days	-
17 June 2013	\$3,496.00	20 days	3 days
17 June 2013	\$3,493.00	-	-

Sigit Wintarto, SNC entitlement to an annual salary of \$47,480.00

Date of payments	Gross Payments made by the First Respondent	Days lapsed in excess of a fortnight since date of last payment	Days lapsed in excess of a month since date of last payment
31 July 2012	\$2,966.00	-	-
2 September 2012	\$2,966.00	19 days	2 days
4 October 2012	\$3,496.73	18 days	2 days
2 November 2012	\$3,496.73	15 days	-
2 April 2013	\$2,147.00	137 days	4 months

Sri Wenda Kesuma, SNC Entitlement to an annual salary of \$49,330.00

Date of payments	Gross Payments made by the First Respondent	Days lapsed in excess of a fortnight since date of last payment	Days lapsed in excess of a month since date of last payment
31 July 2012	\$2,966.00	-	-
2 September 2012	\$2,966.00	19 days	2 days
2 September 2012	\$1,676.00	-	-
4 October 2012	\$2,419.73	18 days	2 days
1 November 2012	\$3,496.73	14 days	-
February 2013	\$2,147.00	-	-
16 March 2013	\$2,147.00	-	-
22 March 2013	\$150.00	-	-
28 March 2013	\$2,147.00	-	-

ANNEXURE B: Table of cumulative underpayments owed to SNC Employees by the First Respondent calculated on a monthly basis

Jerry Kembuan, SNC entitlement to an annual salary of \$47,480.00			
Last day of the month	Cumulative SNC Entitlement	Cumulative payments made by First Respondent	Cumulative underpayment owed to SNC Employee
31 July 2012	\$3,956.67	\$2,966.00	\$990.67
31 August 2012	\$7,913.33	\$2,966.00	\$4,947.33
30 September 2012	\$11,870.00	\$5,932.00	\$5,938.00
31 October 2012	\$15,826.67	\$9,428.73	\$6,397.94
30 November 2012	\$19,783.33	\$12,925.46	\$6,857.87
31 December 2012	\$23,740.00	\$16,422.19	\$7,317.81
31 January 2013	\$27,696.67	\$16,422.19	\$11,274.48
28 February 2013	\$31,653.33	\$16,922.19	\$14,731.14
31 March 2013	\$35,610.00	\$20,399.19	\$15,210.81
30 April 2013	\$39,566.67	\$22,546.19	\$17,020.48
30 May 2013	\$43,523.33	\$28,817.94	\$14,705.39

Moody Sumanti, SNC entitlement to an annual salary of \$47,480.00			
Last day of the month	Cumulative SNC Entitlement	Cumulative payments made by First Respondent	Cumulative underpayment owed to SNC Employee
31 July 2012	\$3,956.67	\$2,966.00	\$990.67
31 August 2012	\$7,913.33	\$3,066.00	\$4,847.33
30 September 2012	\$11,870.00	\$6,032.00	\$5,838.00
31 October 2012	\$15,826.67	\$8,199.73	\$7,626.94
30 November 2012	\$19,783.33	\$16,022.23	\$3,761.10
31 December 2012	\$23,740.00	\$16,022.23	\$7,717.77
31 January 2013	\$27,696.67	\$16,022.23	\$11,674.44
28 February 2013	\$31,653.33	\$16,022.23	\$15,631.10
31 March 2013	\$35,610.00	\$18,169.23	\$17,440.77
30 April 2013	\$39,566.67	\$20,516.23	\$19,050.44
30 May 2013	\$43,523.33	\$23,293.23	\$20,230.10
30 June 2013	\$47,480.00	\$30,282.23	\$17,197.77

Sigit Wintarto, SNC entitlement to an annual salary of \$47,480.00			
Last day of the month	Cumulative SNC Entitlement	Cumulative payments made by First Respondent	Cumulative underpayment owed to SNC Employee
31 July 2012	\$3,956.67	\$2,966.00	\$990.67
31 August 2012	\$7,913.33	\$2,966.00	\$4,947.33
30 September 2012	\$11,870.00	\$5,932.00	\$5,938.00
31 October 2012	\$15,826.67	\$9,428.73	\$6,397.94
30 November 2012	\$19,783.33	\$12,925.46	\$6,857.87
31 December 2012	\$23,740.00	\$12,925.46	\$10,814.54
31 January 2013	\$27,696.67	\$12,925.46	\$14,771.21
28 February 2013	\$31,653.33	\$12,925.46	\$18,727.87
31 March 2013	\$35,610.00	\$15,072.46	\$20,537.54
30 April 2013	\$39,566.67	\$15,072.46	\$24,494.21

Sri Wenda Kesuma SNC Entitlement to an annual salary of \$49,330.00

Last day of the month	Cumulative SNC Entitlement	Cumulative payments made by First Respondent	Cumulative underpayment owed to SNC Employee
31 July 2012	\$3,956.67	\$2,966.00	\$1,144.83
31 August 2012	\$7,913.33	\$2,966.00	\$5,255.67
30 September 2012	\$11,870.00	\$7,608.00	\$4,724.50
31 October 2012	\$15,826.67	\$10,027.73	\$6,415.60
30 November 2012	\$19,783.33	\$13,524.46	\$7,029.71
31 December 2012	\$23,740.00	\$13,524.46	\$11,140.54
31 January 2013	\$27,696.67	\$13,524.46	\$15,251.37
28 February 2013	\$31,653.33	\$15,671.46	\$17,215.21
31 March 2013	\$35,610.00	\$20,115.46	\$16,882.04
30 April 2013	\$39,566.67	\$20,115.46	\$20,992.87

EXHIBIT TWO

**LETTER FROM FAIR WORK OMBUDSMAN IN RESPONSE TO
SUBMISSIONS FROM APPLICANT**



14 February 2017

Mr Frank McMahon
McMahon and Associates
508 Station Street
CARLTON VIC 3054

By email: frank@mcmahonandassociates.com.au

Dear Mr McMahon

Award Coverage – Wild catch fishing industry

I refer to our recent discussions and your request, on behalf of the Southern Bluefin Tuna Association and Wild Catch Fishing Industry (**WCFI**) participants, that the Fair Work Ombudsman (**FWO**) provide clarification regarding the FWO's position on award coverage for participants in the WCFI.

For the reasons that follow, the FWO's current view is that, based on the language of the *Ports, Harbours and Enclosed Water Vessels Award 2010 (PHEWV Award)* and taking into account award modernisation material and the arguments and evidence provided, the PHEWV Award is capable of covering and applying to the WCFI.

The FWO appreciates that the WCFI holds genuine concerns in relation to this issue and understands that the views of the FWO may have implications for your clients. Set out further below are some options open to the WCFI once you have had an opportunity to consider the FWO's position further, should it wish to do so.

In brief, we understand the basis for the WCFI position may be summarised as follows:

- (a) the WCFI has historically and traditionally been award free and this position was confirmed by a Full Bench of the Australian Industrial Relations Commission (**AIRC**) during award modernisation; and
- (b) WCFI operations are not readily amenable to award frameworks as they frequently operate on a 24 hours a day, 7 days a week basis and require considerable flexibility as to hours of work.

It is for the following reasons that the FWO considers the PHEWV Award covers the WCFI:

- (a) based on the ordinary meaning of the words in the coverage clause (see clause 4.1 of the PHEWV Award), specifically the industry definition, it encompasses the WCFI. The PHEWV Award is expressed to cover the ports, harbours and enclosed water vessels industry, which means the operation of vessels of any type wholly or substantially within a port, harbour or other body of water within the Australian coastline or at sea on activities not covered by other modern awards applicable to the maritime industry.

In relation to the definition, the following is noted:

- (i) “*vessels of any type*” is a broad category. There is no express exclusion of a fishing vessel;
 - (ii) there is no definition or other wording in the PHEWV Award that limits in any way what constitutes the “*body of water within the Australian coastline or at sea*”. It has been held by the FWC (in a matter considering whether the PHEWV Award or the *Seagoing Industry Award 2010* (SI Award) applied to a particular employer) that “[t]he term “*sea*” is commonly understood. It is essentially a continuous body of salt water that surrounds the Earth’s land masses” (see *Maritime Union of Australia v Sea Swift Pty Ltd and others* [2016] FWCFB 651 at [29]). While this comment was made in the context of assessing the application of the SI Award, in the FWO’s view it is arguably also relevant to the PHEWV Award. For this reason, the phrase “*body of water within the Australian coastline or at sea*” is to be interpreted broadly. There is no indication that it would exclude waters in which the WCFI operates; and
 - (iii) there is no definition of “*activities*” in the PHEWV Award that would confine the scope of the term in any way;
- (b) the classifications at clause 13 of the award appear as likely to apply on a fishing vessel as any other type of vessel (for example, Deckhand, General Purpose Hand);
- (c) there is no evidence of an express intention to exclude WCFI from coverage of the PHEWV Award. The FWO accepts that during the award modernisation process there was an express intention to exclude the WCFI from the *Aquaculture Industry Award 2010* (**AI Award**) and that the Australian Workers’ Union conceded that the WCFI had historically been an award free industry. It does not follow from the AIRC’s decision in respect of the AI Award that there was an intention that the WCFI would not be covered by *any* modern award. It is apparent that the question of WCFI coverage in relation to the PHEWV award was not considered at all. Further, amendments made to the coverage clause during the award modernisation process suggest an intention to broaden the PHEWV Award to cover any and all activities involving a vessel at sea not otherwise covered by any other award. It is apparent that a decision was made to ensure vessels operating at sea, as well as in ports, harbours and enclosed waters fell within the scope of the award; and
- (d) section 143(7) of the Award Modernisation Request does not constitute a barrier to the WCFI being covered by the PHEWV Award. Both section 143(7) of the *Fair Work Act 2009* (Cth) (**FW Act**) and the Award Modernisation Request contemplate that some employees who were not award covered prior to award modernisation may be caught by a modern award, provided the work they perform is of a “similar nature” to that historically/traditionally regulated by awards. The FWO accepts the argument that the entire WCFI does not appear to have been the subject of award coverage prior to award modernisation and that there is no predecessor award that expressly applied to wild catch fishing. However there is evidence that, at least in some jurisdictions and in some cases, pre-modern awards generally applicable to seagoing vessels were potentially capable of covering fishing activities, including the WCFI.

Options available to the WCFI

Once you have considered the matters raised above we are happy to consider further information and evidence should you wish to provide it, including in relation to the PHEVV award to provide further context from which a different conclusion may be reached. It is the FWO's usual practice that if considering a change in the Agency's position on an issue such as award coverage we would then consult other potentially affected stakeholders, such as unions or key industry bodies in order to consider the views of all parties in reaching a view.

The FWO's position is not and cannot be definitive in the absence of judicial consideration. In this regard I note that the WCFI has a range of other options available to it under the FW Act to have the issue fully determined, which could include:

- (a) raising the matter in the Fair Work Commission (**FWC**) as part of the current 4 yearly review of modern awards;
- (b) seeking to remove ambiguity or uncertainty or correct error in relation to the coverage of the PHEVV Award pursuant to section 160 of the FW Act (if the WCFI is satisfied that has occurred);
- (c) seeking declaratory relief from a Court in an appropriate case.

WCFI participants should of course seek independent legal advice on the above matters before taking such steps and on the issue of award coverage as it applies to individual employers and their employees.

Please contact me should you wish to discuss this matter further or have any questions arising out of the above.

Yours sincerely,



Cletus Brown | Director Knowledge Solutions
Fair Work Ombudsman

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Exhibit 3 – Background information for the Letter.

From: BROWN,Cletus [mailto:Cletus.Brown@fwo.gov.au]
Sent: Wednesday, 1 March 2017 7:45 AM
To: Frank McMahon
Cc: SPITHILL,Patrick
Subject: Wild Catch Fishing Instrument Coverage [SEC=UNCLASSIFIED]

UNCLASSIFIED

Hi Frank

Further to our discussion on Monday, please find below the notes that were used as part of the background information for the formal letter I sent you regarding the FWO position on modern award coverage for the wild catch fishing industry.

I look forward to hearing how this matter progresses.

Kind regards

CB

Possible pre-modern award coverage for the WCFI

JURISDICTION	AWARD(S)	COVERAGE	ISSUES
Federal	N/A	<ul style="list-style-type: none">N/A	<ul style="list-style-type: none">For completeness, we note that the <i>Maritime</i>

JURISDICTION	AWARD(S)	COVERAGE	ISSUES
			<p><i>Industry Seagoing Award 1999</i> applied “in or in connection with vessels trading as cargo or passenger vessels which in the course of such trade proceed to sea (on voyages outside the limits of bays, harbours or rivers)”(clause 4.2) and was respondentcy-based.</p>
New South Wales	<p><i>Motor Boats and Small Tugs (State) Award</i></p>	<ul style="list-style-type: none"> • “all marine motor drivers, coxswains, masters, MED IIIs and assistants on motor boats, Charge Hands, Coxswain Engineers, Shipkeepers, General Purpose Hands, Mooring Gangs Winch Drivers employed in connection with Motor Boats...” (clause 32.1). • A motor boat was a vessel propelled by mechanical power other than steam and which was under 24 m in length overall (clause 2.11). • A Coxswain Engineer was a person holding licences as a Marine Motor Driver and Coxswain, or certificates of a higher grade, engaged or employed as such (clause 2.4). • A General Purpose Hand was a person assisting on or about a Motor Boat or Small Tug, “howsoever engaged” (clause 2.5). 	<ul style="list-style-type: none"> • What is the size of the vessel (if over 24 m in length overall, refer to the <i>NSW Colliers and Small Ships (State) Award</i>)
	<p><i>NSW Colliers and Small Ships (State) Award</i></p>	<ul style="list-style-type: none"> • “able seamen and other classifications employed on colliers and all vessels carrying stone, metal and other materials within the jurisdiction of the Shipping, Sailors, Deep Sea (State) Industrial Committee” (clause 28). 	<ul style="list-style-type: none"> • What is the size of the vessel (if under 24 m in length overall, refer to the <i>Motor Boats and Small Tugs (State) Award</i>) • Is the vessel “in the state”?

JURISDICTION	AWARD(S)	COVERAGE	ISSUES
		<ul style="list-style-type: none"> This jurisdiction included “sailors, lamp trimmers, greasers, firemen, trimmers and deckhands employed on sea-going vessels in the state...excepting those employed on ferryboats and tugs” (clause 28). 	<ul style="list-style-type: none"> Do fish and marine/freshwater creatures constitute “other materials”?
Northern Territory	N/A	<ul style="list-style-type: none"> N/A 	<ul style="list-style-type: none"> We note that the <i>Self-propelled Barge and Small Ships Industry Award 2001</i> applied only to the Perkins Shipping Group. Query whether the vessels here would be small ships in any case (the term is not defined in the award).
Queensland	N/A	<ul style="list-style-type: none"> N/A 	<ul style="list-style-type: none"> We note that the <i>North Queensland Boating Operators Employees Award - State 2003</i> expressly excluded vessels equipped for or used in taking fish or other seafood for commercial purpose (clause 1.3).
South Australia	<i>Ketches and Schooners Award</i>	<ul style="list-style-type: none"> Applied throughout the State of South Australia to the industry and occupations of all persons engaged as crew persons on ketches, schooners, and similar sailing or auxiliary sailing vessels in commercial survey and over 25 metres measured length, whether as employers or employees (clause 1.4). Classifications included were General Purpose Hands, Masters and Mates/Engineers. 	<ul style="list-style-type: none"> Is the vessel within scope (a ketch is a sailing craft with two masts; a schooner has two or more masts)? Is the vessel in “commercial survey”? Is the vessel “in the State”?
Tasmania	N/A	<ul style="list-style-type: none"> N/A 	<ul style="list-style-type: none"> The <i>Shipping Award</i> applied only to the operation of ferries, barges, cruise vessels and charter vessels; and stevedoring.
Western	N/A	<ul style="list-style-type: none"> N/A 	<ul style="list-style-type: none"> The <i>Masters, Mates</i>

JURISDICTION	AWARD(S)	COVERAGE	ISSUES
Australia			<p><i>and Engineers Passenger Ferries Award</i> applied to Masters, Mates and Engineers employed on or about surveyed passenger vessels or <u>other vessels</u> operated in coastal waters (clause 3; emphasis added). It was responsibility based. A Master had command, charge or management of a vessel. A Mate was a person second in command working on a vessel of 35 m in length or more (clause 5).</p> <ul style="list-style-type: none"> • The <i>Deckhands (Passenger Ferries, Launches and Barges) Award</i> applied to “deckhands employed on or about passenger ferries, launches, barges or other vessels operated by the Respondents in the ports of Fremantle and Perth” (clause 3).
Victoria	No award.	N/A	<ul style="list-style-type: none"> • The <i>Agriculture, Forestry and Fishing Industry Sector Minimum Wage Order - Victoria – 1997 (the Order)</i> extended that Order’s application to “any industry in the State of Victoria mainly engaged in ...fishing ...and which incorporates” marine fishing; rock lobster and/or prawn fishing; finfish trawling; squid jigging; line fishing; marine harvesting and/or gathering; marine cultivation; marine hunting; and “marine fishing not elsewhere classified in this sector”.

Cletus Brown | Director Knowledge Solutions

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Exhibit Four - Explanation of Contents

- Letter to Director – Knowledge Solutions, Fair Work Ombudsman 16/10/2016
- Summary of Submissions to Fair Work Ombudsman

Attachment One

- Request under Section 576c (1) – Award Modernisation consolidated version (*Workplace Relations Act 1996*)

Attachment Two

- Extract from Award Modernisation Submission on meaning of ‘traditional’ and ‘historical’

Attachment Three

- 3 (1) Submissions to the Full Bench from Industry Associations confirming Award Free Status of Wild Catch Fishing
- ASBTIA (two)
- Shellfish Industry Council of Australia
- Pearl Producers Association (two)
- 3 (2) Refer 4.1 “Application” of Draft Modern Award for the Australian Workers Union (includes Wild Catch Fishing Tasks) for a Fish, Aquaculture and Marine Products Award. These tasks had not appeared in any previous Award.
- 3.3 Extract from transcript of hearing before Commissioner Lewin – Australian Workers Union (the only union making submissions in this matter) conceding that the Wild Catch Fishing Industry had never been Award covered and supporting the Employer Association Submissions as to the industry’s award free status continuing.

Attachment Four

- Extract from AIRC outlining three options for Aquaculture

Attachment Five

- Extract from AIRC Decision on Aquaculture and Fishing Industries (19) where it is stated that the Miscellaneous Award 2010 would not “cover those parts of the Aquaculture and fishing industries which were previously Award free” and the Aquaculture Award would be on ‘similar terms to the exposure draft’ in which Wild Catch Fishing had never been included at any stage.

Attachment Six

- Extracts from the AIRC Decision on the Miscellaneous Award 2010 confirming it was not intended to cover classes of employees who had traditionally been Award free.

Attachment Seven

- Extract from the Ports, Harbours and Enclosed Water Vessels Award 2010.

Dear Mr Cletus Brown,

Re: Award Coverage - Award Coverage - Wild catch (Commercial) Fishing Industry

At the conclusion of our meeting in Adelaide on 26 September 2016, you confirmed, as we understood, that both the solicitors acting for the Applicant and the solicitors acting for the respondents in the matter of:- Fair Work Ombudsman v Australian Wild Tuna Pty Ltd (ACN 128760734)had agreed that the employees of the respondent were employed under the Ports, Harbours and Enclosed Waters Vessels Award 2010 (MA000052) in the classifications of either Engineer or Deckhand.

As discussed at that same meeting, we respectfully submit that this is not possible, as the Full Bench of the AIRC (as it then was) and the Fair Work Act 2009 at S.143 (7), ensure that the "Award free" status of the employers and employees engaged in the Wild Catch fishing Industry sector, would not be lost during the Award Modernisation process.

As you will see in the attached submission (and supporting documentation) all of the employer groups, Industry Associations, the relevant union (The Australian Workers Union) have all submitted testimony to the AIRC that the wild catch fishing industry have never, historically or traditionally, been covered by an award of any kind, and should not be included in any award. The Award Modernisation Full Bench obviously agreed as there was no evidence whatsoever to challenge that evidence.

In summary however, there are two statements, made by the AIRC Full Bench in their concluding decisions (and supplied to us by Fair Work Commission officers) that summarise the outcome of the Award Modernisation process, in so far as the employers and the employees engaged in the Wild Catch Fishing Industry, and/or engaged in Fish Hatcheries are concerned.

Firstly, In their decision advising that they had decided to make an Aquaculture Industry Award, whilst the Full Bench specifically included all of the aquaculture sectors of the industry that were previously award free, they excluded Wild Catch fishing (as they had done in their previous exposure draft). It should be noted that coverage of Hatcheries employers and employees was at the same time removed from the exposure draft. (Refer Attachment 5 at Paragraph 19 in the attached Submission)

To make certain that employers and employees previously award free were not inadvertently covered by the Miscellaneous award, The AIRC added an additional paragraph to their decision. That paragraph adds (in the words of the Full Bench) some "greater definition of the types of employees excluded." (Refer attachment 6- Paragraph 152 in the attached Submission)

To then ensure that this did not occur in respect to Wild Catch Fishing, the AIRC stated in the Aquaculture Industry decision (referred to above) that the alterations that they had made "to the coverage of the Miscellaneous Award 2010, should ensure that that Award will NOT cover those parts of the aquaculture and fishing industries which have not been previously covered by awards" (Refer Attachments 5 at Paragraph 19 in the attached Submission).

This statement can only be a reference to the Wild catch fishers and the hatchery operators, as every other sector has been included.

We have no wish to intervene in, or interfere with, your case – but it is urgent that we obtain agreement with you as to how this is best resolved, as there are major economic ramifications for the entire Wild Catch Industry should this award free status error not be resolved once and for all.

The attached submission and documentation takes you through Key elements of a process that lasted almost two years, from the original Ministerial request under S. 576C (1) of the Workplace Relations Act 1996, through some of the major submissions and evidence, to the conclusions referred to briefly above

We would be grateful if you could review the attached submission and convene a further meeting at your earliest convenience prior to the industry taking any further action.

Frank McMahon
McMahon and Associates
For and on behalf of the Wild Catch (Commercial) Fishing Industry

EXHIBIT FOUR

Submission to assist in the resolution of the Award Coverage issue for the Wild Catch (Commercial) Fishing Industry

1.0 The Award Modernisation Process

- 1.1 In 2008, relying on Part 10 of the Workplace Relations Act 1996, the Minister for Employment and Workplace Relations pursuant to section 576 (c) (1) of the Workplace Relations Act 1996 (the Act) issued a request to the President of the Australian Industrial Relations Commission (the Commission) to undertake Award Modernisation (Attachment 1).
- 1.2 The process commenced in late 2008 and consisted of a number of discrete steps. The first being the Ministerial Request referred to in 1.1 (above) in which the attention of the FWO is drawn to:
- | | | |
|------------|------|--|
| Paragraphs | 1(a) | Reduce Regulatory Burden |
| | 2 | 'not intended to: |
| | (a) | extend Award Coverage to those classes of employees who because of their role have traditionally been award free' etc. |
| | (d) | Increase costs |
| | 4A | "create a modern award to cover employees who are not covered by another Modern Award and who perform work of a similar nature to that which has historically been regulated by Awards including Modern Awards." |
- 1.3 The Request also directed the President to move through a number of steps. In simple terms the following steps were required:
- | | |
|--------|---|
| Step 1 | Public Consultations |
| Step 2 | Requests for General Submissions on a Modern Award |
| Step 3 | Preparation of exposure drafts based on the existing awards, and other matters raised in the Ministerial Request. |
| Step 4 | Receive submissions on the exposure drafts from parties to the proposed Modern Awards and other interested persons/organisations. |
| Step 5 | Take evidence as necessary in relation to the comments on the Exposure Draft. |
| Step 6 | Make a Modern Award where there were to be no appeals, but reviews were to be undertaken every 4 years and/or at any other time determined by the Full Bench of the AIRC. |
- 1.4 This submission takes the reader through the process in so far as it impacted on the decision of the Full Bench to not make an Award in relation to the Wild Catch

(Commercial) Fishing industry. All other non-managerial activities associated with the 'Seafood' Industry grouping were included in 2 Modern Awards

(a) Aquaculture Industry Award 2010

(b) Seafood Processing Award 2010

1.5 Hatchery operations were not included in the Aquaculture Award as this activity had never been previously Award Covered.

1.6 The remainder of this submission provides some commentary/explanation of the various issues which arose in relation to Wild Catch Fishing and directs the reader to the relevant documentation.

2.0 Submissions to the AIRC on 'traditional', 'Historical' Award regulation and 'Award Free status of the Wild Catch Fishing Industry'.

2.1 Set out in Attachment 2 is an extract from a submission made by the industry to the AIRC which encapsulates the arguments put forward in support of 'Award Free' status throughout the process. This is self-explanatory.

2.2 These submissions were provided in writing late in the Award Modernisation process, but had been made from the bar table from the outset of the public consultations by industry representatives.

2.3 At Attachment 3 are the letters in support, forwarded to the Full Bench from those organisations from within the Seafood Sector who were aware of the threat to their Award Free status.

2.4 Also at Attachment 3 are two documents evidencing the views of the relevant union. The first is the Australian Workers Unions 'version' of their intended 'application' (i.e. Coverage) of the Modern Award, which includes 'Wild Catch' Fishing activities (e.g. Purse Seining, polling). The second document evidences the withdrawal of their claim and the union statements from the Bar Table.

2.5 At this point the 'Wild Catch' Fishing industry participants were advised that it was clear that the industry had not been previously regulated and they would not be included in either of the Seafood Industry Awards.

3.0 The Exposure Drafts commentary by the Full Bench

3.1 At Attachment 4 (para 19) the issue of the possible inclusion of Award Free industries in the Miscellaneous Award reared its head for the first time. The Aquaculture Industry (which had been 75% Award Free) was advised of this possibility and the Wild Catch Fishing Industry realised that this could also happen to them.

4.0 Decision regarding Stage 4 Modern Awards

4.1 As stated in the covering letter the Full Bench when handing down the Modern Award for Aquaculture made a number of comments (paras 17-19 in Attachment 5).

The final coverage clause from the Aquaculture Award excluding Wild Catch Fishing is also included in Attachment 5 where it can be seen that there is no reference to Wild Catch Fishing and clearly separates out those activities which pertain to Aquaculture.

5.0 **The Miscellaneous Award**

- 5.1 It was clear during the hearings for the making of the Miscellaneous Award, that there was concern from many quarters that some employers and employees who had been accepted as traditionally Award free, (and met the necessary tests to remain that way) might now inadvertently be 'roped into' the Miscellaneous Award.
- 5.2 To address this, the Full Bench varied the Exposure Draft as stated in paras 146-152 of their decision (See Attachment 6). There is also a statement from the Full Bench that it did not want every industry covered by an Award. Only those who performed tasks of a similar nature to that which have been historically regulated by Awards including Modern Awards. Wild Catch Fishing does not meet this test.

6.0 **The Ports Harbours Enclosed Water Vessels Award**

- 6.1 As stated in previous correspondence, this Award was obviously never intended to cover Fishers and even if it was, it could not.
- 6.2 The lack of intention is obvious by way of the coverage clause which makes no mention of Fishers (Refer Attachment 7). The Award itself states at 4.4 that it cannot/does not "cover an employee excluded from award coverage by the Act". (Refer Section 143 (7) of the Fair Work Act 2009) – (Set out in Attachment 6).
- 6.3 Since our last meeting the CEO of the Australian Maritime and Fishing Academy has confirmed that the Wild Catch Fishing Industry is excluded from operating in the waters covered by this Award.

7.0 **Conclusion**

- 7.1 As submitted in previous correspondence, the matter of coverage is a critical issue for the Wild Catch Fishing industry. They could not operate under any Award which attempted to regulate hours of work and required persons to be paid for attendance whether they were engaged in work or not.
- 7.2 Any suggestion that Wild Catch Fishing could be award covered in the future will have a negative effect on the investment in the industry. Award Coverage is simply not practical. It was never intended to occur in the Modernisation process and certainly needs to be confirmed as soon as possible, in a manner which removes any doubt from the industry's mind as to the Award Free status of the Wild Catch (Commercial) Fishing industry.

REQUEST UNDER SECTION 576C(1) – AWARD MODERNISATION

CONSOLIDATED VERSION

This is a consolidated version of the Award Modernisation Request, incorporating the Variation of Award Modernisation Request under section 576C(4), issued by Julia Gillard, Minister for Employment and Workplace Relations on 26 August 2009.

I, JULIA GILLARD, MINISTER FOR EMPLOYMENT AND WORKPLACE RELATIONS, pursuant to section 576C(1) of the Workplace Relations Act 1996 (the Act), request that the President of Australian Industrial Relations Commission (the Commission) undertake award modernisation in accordance with this request.

This award modernisation request is to be read in conjunction with Part 10A of the Act.

Objects

1. The aim of the award modernisation process is to create a comprehensive set of modern awards. As set out in section 576A of the Act, modern awards:
 - (a) must be simple to understand and easy to apply, and must reduce the regulatory burden on business; and
 - (b) together with any legislated employment standards, must provide a fair minimum safety net of enforceable terms and conditions of employment for employees; and
 - (c) must be economically sustainable and promote flexible modern work practices and the efficient and productive performance of work; and
 - (d) must be in a form that is appropriate for a fair and productive workplace relations system that promotes collective enterprise bargaining but does not provide for statutory individual employment agreements;
 - (e) must result in a certain, stable and sustainable modern award system for Australia.
2. The creation of modern awards is not intended to:
 - (a) extend award coverage to those classes of employees, such as managerial employees, who, because of the nature or seniority of their role, have traditionally been award free. This does not preclude the extension of modern award coverage to new industries or new occupations where the work performed by employees in those industries or occupations is of a similar nature to work that has historically been regulated by awards (including State awards) in Australia;
 - (b) result in high-income employees being covered by modern awards;
 - (c) disadvantage employees;

- (d) increase costs for employers;
- (e) result in the modification of enterprise awards or Notional Agreements Preserving State Awards (NAPSAs) that are derived from state enterprise awards. This does not preclude the creation of a modern award for an industry or occupation in which enterprise awards or NAPSAs that are derived from state enterprise awards operate. However a modern award should be expressed so as not to bind an employer who is bound by an enterprise award or a NAPSA derived from a state enterprise award in respect of an employee to whom the enterprise award or NAPSA applies;
- (f) exempt or have the effect of exempting employees who are not high income employees, from modern award coverage or application, unless there is a history of exempting employees from coverage across a wide range of pre-reform awards and NAPSAs in the relevant industry or occupation.

2A In paragraph 2(e) an enterprise award means an award that regulates the terms and conditions of employment in:

- (a) a single enterprise (or part of a single enterprise) only; or
- (b) in one or more enterprises, if the employers all carry on similar business activities under the same franchise and are:
 - i. franchisees of the same franchisor; or
 - ii. related bodies corporate of the same franchisor; or
 - iii. any combination of the above.

2B In paragraph 2(e) a NAPSA derived from a State enterprise award means a NAPSA derived from a State award that regulated the terms and conditions of employment in:

- a. a single enterprise (or part of a single enterprise) only; or
- b. in one or more enterprises, if the employers all carry on similar business activities under the same franchise and are:
 - i. franchisees of the same franchisor; or
 - ii. related bodies corporate of the same franchisor; or
 - iii. any combination of the above.

Performance of functions by the Commission

3. In accordance with section 576B of the Act, the Commission must have regard to the following factors when performing its functions under Part 10A of the Act and this award modernisation request:

- (a) the creation of jobs and the promotion of high levels of productivity, low inflation, high levels of employment and labour force participation, national and international competitiveness, the development of skills and a fair labour market;
- (b) protecting the position in the labour market of young people, employees to whom training arrangements apply and employees with a disability;
- (c) the needs of the low paid;

- (d) the desirability of reducing the number of awards operating in the workplace relations system;
- (e) the need to help prevent and eliminate discrimination on the grounds of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin and to promote the principle of equal remuneration for work of equal or comparable value;
- (f) the need to assist employees to balance their work and family responsibilities effectively and to improve retention and participation of employees in the workforce;
- (g) the safety, health and welfare of employees;
- (h) relevant rates of pay in Australian Pay & Classification Scales and transitional awards;
- (i) minimum wage decisions of the Australian Fair Pay Commission; and
- (j) the representation rights, under the Act or the Registration and Accountability of Organisations Schedule, of organisations and transitionally registered associations.

Award modernisation process

- 4. When modernising awards, the Commission is to create modern awards primarily along industry lines, but may also create modern awards along occupational lines as it considers appropriate.
- 4A. The Commission is to create a modern award to cover employees who are not covered by another modern award and who perform work of a similar nature to that which has historically been regulated by awards (including State awards). The Commission is to identify this award as such. This modern award is not to cover those classes of employees, such as managerial employees, who, because of the nature or seniority of their role, have not traditionally been covered by awards. The modern award may deal with the full range of matters able to be dealt with by any modern award however the Commission must ensure that the award deals with minimum wages and meal breaks and any necessary ancillary or incidental provisions about NES entitlements.
- 4B. In creating modern awards, and as indicated at paragraph 3(d) above, the Commission must have regard to the desirability of reducing the number of awards operating in the workplace relations system.
- 4C. In undertaking the award modernisation process, in relation to Victoria, the Commission should take into account transitional awards, transitional Victorian reference awards and common rules that are currently in operation under Schedule 6 to the *Workplace Relations Act 1996* and that would be given effect under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* after 1 July 2009.

- 4D. The Commission must also ensure that modern awards (other than State reference public sector modern awards) are not expressed to cover employees who are covered by a State reference public sector modern award, or a State reference public sector transitional award, or to cover employers of those employees.
5. Division 3 of Part 10A of the Act deals with the terms of modern awards, including the provisions that may be included and must not be included in modern awards. Subject to paragraphs 28 - 46 below, modern awards may also include provisions relating to the National Employment Standards (NES).
6. As soon as practicable after receiving this award modernisation request, the President will consult with the major employer and employee representative bodies on the best process to be followed by the Commission when creating modern awards. The President will then release a clear program and timetable for completing the award modernisation process.
7. Individual Commission members may be directed by the President in the award modernisation process.
8. The Commission will identify the type of work, industry and/or occupations covered by a modern award and the application of each award.
- 8A. In developing the modern award in accordance with paragraph 4A the Commission must have particular regard to paragraph 1(c) and consider how the modern award will include provisions appropriate for application to employers and employees in a range of industries and/or occupations.
9. The Commission is to have regard to the desirability of avoiding the overlap of awards and minimising the number of awards that may apply to a particular employee or employer. Where there is any overlap or potential overlap in the coverage of modern awards, the Commission will as far as possible include clear rules that identify which award applies.
10. The Commission will prepare a model flexibility term to enable an employer and an individual employee to agree on arrangements to meet the genuine individual needs of the employer and the employee.
11. Each modern award will include the model flexibility term with such adaptation as is required for the modern award in which it is included.
- 11AA The Commission must ensure that the flexibility term:
- identifies the terms of the modern award that may be varied by an individual flexibility arrangement;
 - requires that the employee and the employer genuinely agree to an individual flexibility arrangement;
 - requires the employer to ensure that any individual flexibility arrangement must result in the employee being better off overall;
 - sets out how any flexibility arrangement may be terminated;
 - requires the employer to ensure that any individual flexibility arrangement be in writing and signed:
 - (a) in all cases – by the employee and the employer;

- (b) if the employee is under 18 – by the parent or guardian of the employee;
- requires the employer to ensure that a copy of the individual flexibility arrangement be given to the employee;
- prohibits an individual flexibility arrangement agreed to by an employer and employee from requiring the approval or consent of another person, other than the consent of a parent or guardian where an employee is under 18; and
- where an employee genuinely agrees with an employer to make an individual flexibility arrangement but is either unable to read and/or sign that arrangement, a parent, guardian or representative may sign that agreement on their behalf.

11AB. The Commission can also require any appropriate additional protections for employees or groups of employees of Australian Disability Enterprises.

11A. The Commission should ensure that each modern award includes a clause that sets out a process or process to ensure the settlement of disputes in relation to matters arising under the award. The Commission should ensure the process or processes are suitable for the settling of disputes in relation to matters arising under the NES for employees to whom awards apply. In drafting this clause the Commission may have regard to any method of dispute resolution that it considers appropriate.

12. The Commission may include transitional arrangements in modern awards to ensure the Commission complies with the objects and principles of award modernisation set out in this award modernisation request.

Consultation

13. The President will consult with the Australian Fair Pay Commission and State industrial tribunals as appropriate.

14. The Commission will prepare an exposure draft of each modernised award. The Commission will, as appropriate, hold a conference or conferences with major employer and employee representative bodies for the purpose of informing the preparation of each exposure draft.

15. The Commission is to publish exposure drafts of each modernised award for the purpose of further consultation and to ensure that all stakeholders and interested parties have a reasonable opportunity to comment upon the exposure drafts. In so far as practicable, the exposure drafts will be electronically published for comment.

16. Consultation on exposure drafts of modern awards will be open and transparent.

Creating modern awards

17. Upon completion of the consultation processes in relation to an exposure draft, the Commission will prepare the modern award.

18. The President may establish one or more Full Benches for the purpose of creating modern awards. Each modern award is to be created by a Full Bench.

Timing

19. The Commission is to complete the award modernisation process by 31 December 2009.
20. To that end, the Commission should endeavour by 30 June 2008 to have identified a list of priority industries or occupations for award modernisation, developed a timetable for completing the award modernisation process and developed a proposed model award flexibility clause. In developing its priority list, the Commission will have regard to those industries and occupations with high numbers of Australian Workplace Agreements and NAPSAs.
21. In identifying a list of priority industries or occupations for award modernisation, developing a timetable for completing the award modernisation process and developing a proposed model award flexibility clause, the Commission is to consult with major workplace relations stakeholders and other interested parties. It is acknowledged that the Commission will require the full support and cooperation of major workplace relations stakeholders and other interested parties in order to conduct that consultation.
22. In developing a timeframe for completing the award modernisation process, the Commission should endeavour to have created by the end of December 2008 modern awards for each of the priority industries or occupations it has identified following the consultations with key workplace relations stakeholders.

Reporting on the progress of award modernisation

23. The President is to publish a quarterly report outlining:
 - (a) those industries or occupations undergoing or about to commence award modernisation, including the Commission member responsible, under the auspices of the Full Bench, for those industries and/or occupations;
 - (b) the progress of award modernisation, including any significant developments during the quarter, key issues or developments scheduled for the next quarter and any adjustments made to the timetable determined by the President for the award modernisation process; and
 - (c) any other matters which the President considers appropriate.
24. The first quarterly report should relate to the June quarter 2008.

Minimum wages

25. In accordance with section 576J of the Act, minimum wages are a matter that may be dealt with in modern awards. In dealing with minimum wages the Commission is to have regard to the desire for modern awards to provide a comprehensive range of fair minimum wages for all employees including, where appropriate, junior employees, employees to whom training arrangements apply and employees with a disability in order to assist in the promotion of employment opportunities for those employees.

Allowances

26. Allowances should be clearly and separately identified in modern awards.
27. The Commission is to ensure that all modern awards include an appropriate method or formula for automatically adjusting relevant allowances when minimum wage rates are adjusted.

Restaurant and catering industry

27A. The Commission should create a modern award covering the restaurant and catering industry, separate from those sectors in the hospitality industry providing hotelier, accommodation or gaming services. The development of such a modern award should establish a penalty rate and overtime regime that takes account of the operational requirements of the restaurant and catering industry, including the labour intensive nature of the industry and in the industry's core trading times.

Interaction with the National Employment Standards

28. The NES consist of 10 legislated minimum conditions of employment for all employees covered by the federal system. The NES will establish a simple legislative framework of minimum entitlements with straightforward application or machinery rules that are essential to the operation of each entitlement. The NES will operate in conjunction with a relevant modern award to provide a fair safety net of minimum entitlements for award covered employees.
29. A modern award may cross reference a provision of the NES. A modern award may replicate a provision of the NES only where the Commission considers this essential for the effective operation of the particular modern award provision. Where a modern award replicates a provision of the NES, NES entitlements will be enforceable only as NES entitlements and not as provisions of the modern award.
30. A modern award cannot exclude the NES or any provision of the NES. However, a modern award can provide ancillary or incidental detail in relation to the operation of an entitlement under the NES but only to the extent that the term is not detrimental in any respect, when compared to the NES.
31. Subject to paragraphs 34 and 35 below, a modern award may include industry-specific detail about matters in the NES.
32. Subject to paragraph 34 below, a modern award may supplement the NES where the Commission considers it necessary to do so to ensure the maintenance of a fair minimum safety net for employees covered by the modern award, having regard to the terms of this request and the existing award provisions (including under NAPSAs) for those employees, such as small business redundancy entitlements or the rate of pay at which various types of leave is taken. The Commission may only supplement the NES where the effect of these provisions is not detrimental to an employee in any respect, when compared to the NES.
33. The NES provides that particular types of provisions are able to be included in modern awards even though they might otherwise be inconsistent with the NES. The Commission

may include provisions dealing with these issues in a modern award. The NES allows, but does not require, modern awards to include terms that:

- provide for loadings to be paid to school-based trainees and school-based apprentices in lieu of certain entitlements;
- enable the averaging of hours of work over a specified period;
- provide for the cashing out of paid annual leave by an employee, provided that such terms require:
 - the retention of a minimum balance of 4 weeks' leave after the leave is cashed out;
 - the cashing out of each amount be by separate agreement in writing; and
 - payment of cashed out leave be at least the full amount that would have been payable to the employee had the employee taken the leave that the employee has forgone;
- require employees, or allow employees to be required, to take paid annual leave, but only if the requirement is reasonable;
- otherwise deal with the taking of paid annual leave;
- provide for the cashing out of paid personal/carer's leave, provided that such terms require:
 - the retention of a minimum balance of 15 days' leave after the leave is cashed out;
 - the cashing out of each particular amount be by separate agreement in writing; and
 - the payment of cashed out leave be at least at the full amount that would have been payable to the employee had the employee taken the leave that the employee has forgone;
- relate to the kind of evidence required to be provided by an employee when taking paid personal/carer's leave, unpaid carer's leave or compassionate leave;
- provide for the substitution of public holidays by agreement between an employer and employee;
- specify the period of notice an employee may be required to give when terminating their employment; and
- specify further situations in which section 119 (redundancy pay) does not apply to the termination of an employee's employment.

33AAA Where an industry has developed specific arrangements for termination and redundancy to reflect the way the industry operates, the Commission may specify in a modern award that section 119 of the NES does not apply in those circumstances.

33AA Where a modern award covers work performed in remote locations, the Commission should include terms that permit the roster arrangements and working hours presently operating in practice in those locations to continue after the making of the modern award.

33A The NES allows a modern award to include terms requiring an employee, or allowing an employee to be required, to take paid annual leave in particular circumstances, but only if the requirement is reasonable. Where an award covers remote work, a modern award should provide that an employer may reasonably require employees who work on a roster cycle make up of working days (on-duty period) and non-working days (off-duty period) to do either or both of the following:

- (i) to take any period or periods of annual leave of the same duration as the on-duty period under the employee's work cycle roster;
- (ii) to take annual leave on any day nominated as annual leave as part of the roster cycle.

34. In relation to long service leave, the Australian Government will, in co-operation with state governments, develop a national long service leave entitlement under the NES. In doing so, the Australian Government will also consult with major employer and employee representative bodies. Until then, long service leave entitlements derived from various sources will be protected. So as to not pre-empt the development of a nationally consistent approach, the Commission must not include a provision of any kind in a modern award that deals with long service leave.
35. Other than expressly authorised under this request, the Commission must not include a term in a modern award on the basis that it would be an allowable modern award matter where the substance of the matter is dealt with under the NES.

Termination and Redundancy

36. The NES excludes employees from redundancy entitlements where their award contains an 'industry specific redundancy scheme'. An 'industry specific redundancy scheme' in a modern award will operate in place of the NES entitlement, including the NES redundancy definition, in these circumstances."
37. An 'industry specific redundancy scheme' is one identified as such in a modern award.
38. The Commission may include an 'industry specific redundancy scheme' in a modern award.
39. In determining whether particular redundancy arrangements constitute an 'industry specific redundancy scheme', the Commission may have regard to the following factors:
 - when considered in totality, whether the scheme is no less beneficial to employees in that industry than the redundancy provisions of the NES; and
 - whether the scheme is an established feature of the relevant industry.

Shift workers

40. The NES apply to shift workers and provide that a shift worker is entitled to an additional week of annual leave – that is, five weeks of annual leave for each year of completed service.
41. The NES rely on a modern award to define, where required, a shift worker as appropriate for the particular industry covered by the award.
42. In modernising awards, the Commission must have regard to whether it is appropriate to include a definition of shift worker in a modern award that applies to these types of employees for the purposes of the NES annual leave entitlements.

Piece workers

43. The NES apply to a piece worker.
44. The NES rely on modern awards to define a piece worker and set out rules relating to the payment of NES entitlements (based on ordinary hours of work) for a piece worker.
45. In modernising awards, the Commission must have regard to whether it is appropriate to include:
 - (a) a definition of piece worker in a modern award that applies to these types of employees (if an employee is employed on the basis of hours worked, it is not expected that such employees would be defined as piece workers); or
 - (b) a provision that would provide a calculation of payment, a payment rate, or a payment rule in relation to a piece worker employee with respect to paid leave or paid absence under the NES. For example, a method of making payment to a piece worker employee when that employee is absent on annual leave. Any provisions setting out a calculation payment must take into account the various methods by which a piece worker may be remunerated under the modern award, including by incentive payments or bonuses.

Ordinary hours of work

46. Many entitlements in the NES rely on modern awards to set out ordinary hours of work on a weekly or daily basis for an employee covered by the modern award. The Commission is to ensure that it specifies in each modern award the ordinary hours of work for each classification of employee covered by the modern award for the purpose of calculating entitlements in the NES. The Commission is also to ensure that ordinary hours (or the process for determining ordinary hours) are specified for each type of employment permitted by the modern award (for example, part time, casual). In the case of employees to whom training arrangements apply, the Commission should ensure that ordinary hours (or the process for determining ordinary hours) are specified for the purpose of calculating entitlements in the NES.

Maritime Industry

47. When creating a modern award covering the maritime industry, the Commission should ensure that the modern award covers employers on licensed, permit or majority Australian-crewed ships (as defined in item 1 of Schedule 2 to the *Fair Work Amendment Regulations 2009* (No.1)) and their employees.
48. The Commission should give consideration to the circumstances and needs of the employers and employees in the areas described in these regulations.
49. As well as giving consideration to the modern awards objective in s576A of Part 10A of the *Workplace Relations Act 1996*, the other terms of this award modernisation request and the NES, the Commission should consider whether it is appropriate to establish award provisions for employers of the crews of permit ships and their employees relating to accrued entitlements and associated arrangements. In considering this matter, the Commission should have regard to the needs of those employers and employees who may

be in Australia for relatively short periods or who are regularly moving in and out of the Australian jurisdiction.

Horticulture Industry

50. The Commission should enable employers in the horticulture industry to continue to pay piece rates of pay to casual employees who pick produce, as opposed to a minimum rate of pay supplemented by an incentive based payment.
51. Where a modern award covers horticultural work, the Commission should:
 - have regard to the perishable nature of the produce grown by particular sectors of the horticulture industry when setting the hours of work provisions for employees who pick and pack this produce; and
 - provide for roster arrangements and working hours that are sufficiently flexible to accommodate seasonal demands and restrictions caused by weather as to when work can be performed.

Hours of work and penalty provisions – work that involves receiving calls, using call centre technology and entering and retrieving data

52. Where a modern award applies to employees primarily performing the work of receiving calls, using call centre technology and entering and retrieving data, the Commission should establish working hours and penalty rates arrangements that are substantially based upon those that presently apply to those employees within the industry in which they work.

Overtime penalty rates – part-time work

53. The Commission should ensure that the hours of work and associated overtime penalty arrangements in the retail, pharmacy and any similar industries the Commission views as relevant do not operate to discourage employers from:
 - offering additional hours of work to part-time employees; and
 - employing part-time employees rather than casual employees.

Attachment 2 – Extract from Award Modernisation Submission on ‘Traditional’ and/or Historical Award Regulation

3.2 The industry work a wide variety of hours in what is a 24 hour, 365 days a year industry. Until the early 1990’s there were no Awards at all in an industry that had its beginnings in the 1870’s. The Ministerial Request under S576c of the Fair Work Act 2009 states that ‘Modern Awards are not intended to cover workers who operate in Award free industries’. This submission provides supportive evidence for the maintenance of this historical Award free status.

3.3 At Object 2 (a) the Ministerial Request under S576c of the Act states the following:

“The creation of Modern Awards is not intended to:

extend award coverage to those classes of employees, such as managerial employees, who, because of the nature or seniority of the role, have traditionally been award free. This does not preclude the extension of modern award coverage to new industries or new occupations where the work performed by employees in those industries or occupations is of a similar nature to work that has historically been regulated by awards (including state awards) in Australia;”

The Ministerial Request also states that the creation of Modern Awards is not intended to ‘disadvantage employees’ or ‘increase costs for employers.

There are other aspects of the Ministerial Request that are pertinent but primarily the discussion has to be about the words that say that:

The creation of Modern Awards is not intended to extend award coverage to those classes of employees..... who because of the nature..... of their role, have, traditionally been award free.

The words relating to ‘managerial employees’ and seniority have been deleted for the moment to concentrate on the words which deal with employees who have been award free (traditionally) because of the nature of their role.

3.4 Before going to those very important words, it is worth noting that the Act uses slightly different words relating to employees “who have been traditionally (a) not been covered by awards (whether made under the laws of the Commonwealth or the States), The explanatory memorandum (to the Fair Work Bill) uses slightly different words again historical rather than traditional. ‘A modern award must not be expressed to cover classes of employees, who, because of the nature or seniority of their role, have traditionally not been covered by awards.....or who perform work that is not of a similar nature to work that has been traditionally regulated by such awards’. The ministerial request uses the words ‘**historically** regulated by such awards’. We have dealt with both words in the course of our submission.

A number of things are clear.

- 3.4.1 The legislation clearly contemplates employees other than ‘managerial employees’ or ‘senior employees’ being award free (i.e. not covered by a Modern Award).
- 3.4.2 There are 2 tests in determining whether ‘award free’ is justified and consistent with the legislation (and our submission is that they are inextricably linked).
- (a) Firstly, have they traditionally been covered by Awards?
 - (b) Secondly, is the work they perform of a similar nature to other work that has been traditionally covered by Awards?
- 3.5 To answer the questions we must examine the word (or concept) of tradition. The Oxford Dictionary relates to tradition as below
- ‘A belief , a way of doing something that has existed for a long time among a particular group of people; a set of those beliefs or customs, religious, cultural etc traditions’*
- *The region is steeped in tradition.*
- *The company has a long tradition of fine design.*
- *The British are said to love tradition (=to do things in the way they have always been done).*
- *They broke with tradition (= they did things differently)*
- 3.6 In reading this definition we would submit that :
- ‘a way of doing something that has existed for a long time among a particular group of people’ and ‘to do things they way they have always been done’ best fit the context in which the legislation has chosen to use the word.
- 3.7 It is noteworthy that the Ministerial Request uses the word ‘historically’ in place of ‘traditionally’ yet the Act and the explanatory memorandum both use traditionally. We submit that the industry has been award free both traditionally and historically.
- 3.8 We submit that the evidence set out in this submission below clearly demonstrates that the Wild Catch Fishing industry has always been traditionally (and historically) award free.

Attachment 3

Evidence, Submissions and Testimony in respect to the Award Free status of the Wild Catch Fishing Industry

3 (1) Submission to the Full Bench from Industry Associations confirming Award Free Status of Wild Catch Fishing and supporting letters

3 (2) Australian Workers Union Exposure Draft including reference to Wild Catch Fishing in coverage clause

3 (3) Australian Workers Union withdrawal of any claim relating to Wild Catch Fishing in response to the Industry's submissions that there was no previous award Regulation.

AUSTRALIAN SOUTHERN BLUEFIN TUNA
INDUSTRY ASSOCIATION LTD (ASBTIA)

9 December 2008

Commissioner Lewin
Australian Industrial Relations Commission
GPO Box 1994
Melbourne, Victoria 3001

Dear Commissioner

Second Submission to Award Modernisation Process Hearings – for Hearing on 12 December 2008.

Background

We note the issues arising for tuna catching/ranching from the Agriculture Hearing on 27 November were:

- (1) Whether there might be a separate Aquaculture Award, and whether it could include a wild catch/ranching industry such as tuna.
- (2) Whether the Award Modernisation Process covers industries such as tuna catching/ranching which are not currently covered by an Award, and which wish to remain Award-free. The related question is whether the Commission would be required to register the position of such an industry.
- (3) The intent of the Fair Work Bill 2008 (“the Bill”), introduced into Federal Parliament on 25 November 2008. This Bill will now go to Committee, with the aim of enactment by 1 July 2009.
- (4) If the outcome of the above processes is that tuna catching/ranching is still required to be covered by an Award, then what is the appropriate Award.

Requests to the Commission on the Above Issues

The tuna catching/ranching industry requests that the Commission records that:

- (1) The industry wishes to be award-free. We see this as a separate issue from “agreements”, as defined by the Bill.
- (2) The industry does not request the Commission to decide on whether the industry should be award-free. This would only arise if the Government’s intent is that all workers (whether over \$100,000pa or not) be covered by an Award. We suggest that the Bill provides for award-free industries (eg see Clause 19), and specifies the conditions under which these industries must operate.

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- (3) The industry has no interest in being part of any separate Aquaculture Award. As noted in our first Submission, and below, the tuna catching/ranching is an offshore wild fish operation. It is more equivalent to the agistment of wild horses, but a long way offshore. The only common factor with other aquaculture is that it is fish.
- (4) The industry notes that it is possible that our interpretation that the Bill provides for award-free industries is not correct. It is also possible that these provisions in the Bill may be amended before enactment. The question then arises as to which existing Award is the most appropriate one for tuna catching/ranching. Our strong preference is the Pastoral Award as an umbrella, with specific provisions for tuna catching/ranching. These provisions would draw on the current terms and conditions of employment, the NES content in the Bill, and the provisions in the Bill for employee/employer agreements (eg on averaging of hours).

Background to Tuna Catching/Ranching

The catching of marine finfish species in Australia for ranching exists only in Port Lincoln South Australia (SA). It exists only for Southern Bluefin Tuna (SBT). The only rough equivalent we know in any other marine species is wild pearl shell.

SBT is a fish species which migrates across the Southern Hemisphere High Seas, and sometimes in the Australian Fishing Zone. It is harvested by a range of countries – Japan, Australia, Indonesia, Korea, Taiwan, NZ, and the Philippines – under an international agreement.

The Australian industry is totally owned by Australian residents. The Australian Southern Bluefin Tuna Industry Association Ltd (ASBTIA) represents all the operators in the industry.

The technology is only useable in SA because it is the only place in Australia where the Southern Bluefin Tuna (SBT) school in the numbers and quality to support viable tuna ranching. It was in Port Lincoln that the global technology behind tuna ranching was invented.

The tuna is caught live in the Great Australian Bight (GAB) up to 250km from Port Lincoln, during December to March, the time when the tuna are seasonally in the GAB. They can only be caught at that time.

They are then towed in large pontoons for 15-30 days to ranching pontoons offshore from Port Lincoln. The tuna are then ranched (ie fed, husbanded) for 3-6 months before harvesting and marketing – over 99% goes to export.

Husbandry is necessarily 7 days/week, and at all times of night and day, consistent with the feeding pattern of the tuna in the wild. Each company is highly integrated – from catching, towing, husbandry, harvesting, and selling.

Australia competes in the international tuna market against subsidised Northern Bluefin Tuna ranching operations in Mexico, Japan, and the Mediterranean countries.

The viability of the Australian operations depends on being more efficient, and this depends on having total flexibility in work practices. This includes intensive multi-skilling.

The result has been high retention rates, and a consistent growth in the work force. The industry now generates around 700 direct jobs, and over 2,000 direct and indirect jobs, of all skill levels.

Yours Sincerely
Brian Jeffriess
Chief Executive Officer – ASBTIA
Mob: 0419840299
E. austuna@bigpond.com



Commissioner Lewin
Australian Industrial Relations Commission
GPO Box 1994
Melbourne, Victoria 3001

9th December 2008

Submission to Award Modernisation Process – The Australian Oyster Industry
Dear Commissioner,

Background

The Shellfish Industry Council of Australia (SICOA) is the national peak industry representative body for the Australian Oyster Industry.

Oysters in Australia are predominately produced in 3 states, which are represented by the following state oyster bodies:

South Australia – **The South Australian Oyster Growers Association**
NSW – **New South Wales Farmers Federation – Oyster Section**
Tasmania – **The Tasmanian Shellfish Executive Council.**

SICOA is effectively comprised of these 3 state representative bodies.

Current Award Coverage

South Australia – No State Award
NSW – Oyster Farms Award
Tasmania – Shellfish Industry Award.

Request

We submit that:

1. SICOA seeks urgent clarification from the AIRC as to whether a State industry that has no history of award coverage is required to be covered by the Award Modernisation Process, even if there are awards in other similar state industries?
2. The above request has been made as SAOGA has made it clear that there has been no history of an award in South Australia, and do not believe one is warranted to cover their operations.

The South Australian Situation

SICOA is of the understanding that while significant flexibility is needed across all oyster operations in Australia, this particularly so in South Australia. The oyster



industry in that state is exposed to an unusual occurrence of "Dodge Tides", where parts of the tidal cycle have little to no tidal movement.

Given that oyster farmers need the tide to expose the oyster sites to work them as part of the tidal cycle, this unusual occurrence combined with the highly fluctuating weather associated with the Great Australian Bight can see tides "blown out" for some lengthy periods. This is particularly so during the late autumn through to early spring.

This can lead to periods of little work for these industry people and those that work for them, but when better weather and good tides line after these periods, then flexible hours of work are needed to "catch up", which can take some time. SAOGA has informed our organisation that oysters are grown in highly exposed areas for this style of culture compared to other parts of Australia, hence the need for extra flexibility.

Further Request

SICOA would request that if the AIRC determines that a Modern Award is required as per point 1, then we would request the following.

- That any Award includes the flexibility outlined in part V, Section 1 part (a) (Hours and Days of Work) of the Tasmanian Shellfish Award, as this level of flexibility would be needed to effectively cover the diverse nature of the oyster industry in these 3 states.
- SICOA understands that Oysters may be part of the PIA. If this was the case (or if the industry was attached to such an award), then a separate annex would be required to address our special needs.
- SICOA does not support the approach taken by the AWU in regards to the Award Modernisation Process.

If either yourself or anyone else from the AIRC would like to discuss any of the above, please do not hesitate contact me on 0428 476 245 or email bruce.zippel@bigpond.com

Yours Sincerely

Bruce Zippel
Chairman
Shellfish Industry Council of Australia

AUSTRALIAN SOUTHERN BLUEFIN TUNA
INDUSTRY ASSOCIATION LTD (ASBTIA)

The President
Australian Industrial Relations Commission
GPO Box 1994
Melbourne, Victoria 3001

Submission to Award Modernisation Process Hearings – on 27 November 2008.

Request

We submit that:

- (1) Tuna catching and ranching is not currently covered by any Federal or State Award, and therefore is not covered by the Award Modernisation process.
- (2) The submission by AWU (AMWU) of a document which might cover tuna catching and ranching is not relevant to the Award Modernisation process. If sustained, the document should be dealt with elsewhere.

We have only just become aware of the Award Modernisation process, and seek your permission to make this Submission. We will attend the next Agriculture Hearing to address any issues.

Tuna Catching and Ranching

The catching of marine finfish species in Australia for ranching exists only in Port Lincoln South Australia (SA). It exists only for Southern Bluefin Tuna (SBT).

SBT is a fish species which migrates across the Southern Hemisphere High Seas, and sometimes in the Australian Fishing Zone. It is harvested by a range of countries – Japan, Australia, Indonesia, Korea, Taiwan, NZ, and the Philippines – under an international agreement.

The Australian industry is totally owned by Australian residents. The Australian Southern Bluefin Tuna Industry Association Ltd (ASBTIA) represents all the operators in the industry.

The technology is only useable in SA because it is the only place in Australia where the Southern Bluefin Tuna (SBT) school in the numbers and quality to support viable tuna ranching. It was in Port Lincoln that the global technology behind tuna ranching was invented.

The tuna is caught live in the Great Australian Bight (GAB) up to 250km from Port Lincoln, during December to March, the time when the tuna are seasonally in the GAB. They are then towed in large pontoons for 15-30 days to ranching pontoons offshore from Port Lincoln. The tuna are then ranched (ie fed, husbanded) for 3-6 months before marketing – over 99% goes to export.

Husbandry is necessarily 7 days/week, and at all times of night and day, consistent with the feeding pattern of the tuna in the wild. Each company is highly integrated – from catching, towing, husbandry, harvesting, and selling.

Australia competes in the international tuna market against subsidised operations in Mexico and the Mediterranean. The viability of the Australian operations depends on being more efficient, and this depends on having total flexibility in work practices. This includes intensive multi-skilling.

The result has been high retention rates, and a consistent growth in the work force.

Award Issues

From time to time, the work force and the industry association have been approached by various trade unions to seek coverage. In two cases, documents very similar to that submitted to the Modernisation Process by the AMWU have been sent to a range of industry, including the work force. To our knowledge, they have never been sustained by the union bodies involved, or by anyone else.

Other States

We note that there are Awards for some parts of aquaculture in some other States. These aquaculture operations are very different from offshore tuna capture/ranching. They also possibly reflect particular conditions in those States – but the background to their existence is not always clear.

Yours Faithfully
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7th November 2008

Commissioner Lewin
Australian Industrial Relations Commission
GPO Box 1994
Melbourne, Victoria 3001

Submission to Award Modernisation Process Hearings – on 27 November 2008.

We submit that:

- (1) The pearling industry in Western Australia (WA) and the Northern Territory (NT), which involves pearl oyster diving and pearl culture, is not currently and never has been covered by any federal award or state award. Consequently the industry should not be covered by the Award Modernisation process as there is no relevant industry award to modernise.
- (2) The submission by the AWU of a document which might cover pearl oyster fishing and pearl culture is not relevant to the Award Modernisation process.
- (3) No pearling company in WA or NT, nor the Pearl Producers Association, were involved in the development of the proposed award titled *Fish, Aquaculture and Marine Products Award 2010* and do not support the terms and conditions within the proposed award as they are not relevant and do not reflect the present workplace needs of the pearling industry.

We have recently become aware of the Award Modernisation process, and seek your permission to make this Submission. We will attend the next Agriculture Hearing to address any issues regarding our position.

The *Pinctada maxima* Pearling industry

The *P. maxima* pearling industry is one of Australia's oldest, most important and valuable fishing and aquaculture industries. The pearling industry is specifically based on the *Pinctada maxima* pearl oyster species and stretches from NW Cape in WA to the eastern border of the Northern Territory in waters that are naturally conducive to providing the required conditions for pearl culture. Since the mid 1950's the industry has focused on the production of cultured pearls and has built an enviable reputation as the world's leader in the production of the highest quality pearls.

The industry is now highly organised and geared to maintaining sustainable production on an economic and environmentally sound basis as the world's premium producer of the highly prized, silver-white South Sea pearls grown in the silver-lip pearl oyster *Pinctada maxima*.

The Australian *P.maxima* pearl oyster industry has an enviable record for producing a high quality product with an annual export value of production of up to A\$250 million. The required infrastructure requirements and demand for operational supplies by the industry provides a significant benefit to regional economies if the usual practice of attributing economic multipliers to these figures were calculated.

A commitment to excellence by the Australian pearling industry has developed technical expertise and husbandry techniques that are unique from any other aquaculture or fishing based industry. These skills and experiences have been honed to such a point that each oyster can produce up to three pearls during its productive life, whilst pearling industries in other countries can generally only achieve one. This provides a significant economic advantage when comparing cost/return ratios per oyster and this advantage must be maintained to guarantee the ongoing viability of the Australian industry.

Award Issues

From time to time, the work force and the industry association have been approached by various trade unions to seek coverage. These approaches have never been accepted by the industry workforce or sustained by the union bodies involved, or by anyone else and therefore the WA and NT pearling industry remains an award free industry.

This is due to the excellent relationship between employers and employees in the industry, the present fair working conditions and everybody having a commitment and an understanding of the complexities associated with the operational methods and the flexibilities required of the workforce to forge success in the industry. Flexibilities in working conditions are essential as the industry can be dictated to by the seasonal variations and weather conditions associated with the north west of Australia, working at sea in a remote environment and tending to a living organism that needs care 7 days a week, 24 hours per day.

Other States

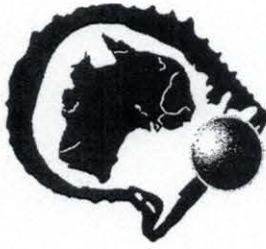
We note that there is a pearl culture state award in Qld. This award can not be applied under the Award Modernisation as the Qld industry cannot be compared to the WA and NT pearling industry. The Qld industry is very, very small, uses different operational methods, does not require the sophisticated infrastructure or flexibilities in working conditions that the WA and NT industry requires. The quantity and quality of the product produced is insignificant compared to that of the WA and NT pearling industry. The Qld industry does not export its products.

If you require any further information regards this submission please do not hesitate to contact me.

Yours sincerely,



Brett McCallum
Executive Officer



pearl producers
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9 December 2008

Commissioner Lewin
Australian Industrial Relations Commission
GPO Box 1994
Melbourne, Victoria 3001

Dear Commissioner

Second Submission to Award Modernisation Process Hearing - 12 December 2008.

Background

We note the issues arising for *P. maxima* pearl oyster catching/pearl production from the Agriculture Hearing on 27 November were:

- (1) Whether there might be a separate Aquaculture Award, and whether it could include a wild catch/production industry such as pearling.
- (2) Whether the Award Modernisation Process covers industries such as pearl oyster catching/pearl production which are not currently covered by an Award, and which wish to remain Award-free. The related question is whether the Commission would be required to register the position of such an industry.
- (3) The intent of the Fair Work Bill 2008 ("the Bill"), introduced into Federal Parliament on 25 November 2008. This Bill will now go to Committee, with the aim of enactment by 1 July 2009.
- (4) If the outcome of the above processes is that pearl oyster catching/pearl production is still required to be covered by an Award, then what is the appropriate Award.

Requests to the Commission on the Above Issues

The pearl oyster catching/pearl production industry requests the Commission records that:

- (1) The industry wishes to remain award-free. We see this as a separate issue from "agreements", as defined by the Bill.
- (2) The industry does not request the Commission to decide on whether the industry should be award-free. This would only arise if the Government's intent is that all workers (whether over \$100,000pa or not) be covered by an Award. Our position is the *Fair Work Bill 2008 (Bill)* provides for award-free industries and specifies the conditions under which these industries must operate.

- (3) The industry has no interest in being part of any separate Aquaculture Award. As noted in our first Submission, and below, the pearl oyster catching/pearl production industry is a very unique, extremely remote, offshore wildstock fishing and production operation and is unlike any other industry.
- (4) The industry notes our interpretation that the *Bill* provides for award-free industries may not be correct. It may also be possible these provisions in the *Bill* may be amended before enactment. The question then arises as to which existing Award is the most appropriate for the pearl oyster catching/pearl production industry. Our strong preference is that any such award must contain specific provisions regards flexible working days and times that enable the pearl oyster catching/pearl production industry to remain both sustainable and viable. These provisions would draw on the current terms and conditions of employment, the NES content in the *Bill*, and the provisions in the *Bill* for employee/employer agreed working arrangements (eg on averaging of hours).

Background to Pearl oyster catching / pearl production

The catching of *P.maxima* pearl oysters in Australia for pearl production exists only in the remote far North West of Western Australia. The only roughly equivalent industry we know in any other marine species is Southern Blue Fin tuna in South Australia. The *P.maxima* pearling industry is one of Australia's oldest, most important and valuable fishing/production industries.

The Australian industry is totally owned by Australian residents. The Pearl Producers Association (PPA) represents all the operators in the industry.

P.maxima is a pearl oyster species which once existed throughout Indonesia, Phillipines and Burma and the tropical zone of Australia. The Western Australian *P.maxima* pearl oyster fishery off Broome is the last remaining commercial pearl oyster fishery in the world and its ongoing sustainability and viability always remains sensitively balanced. Management of this industry is under strict government regulation with total allowable catch quotas imposed to maintain stock sustainability using world's best fishery management practice and research.

The remote region where the fishery takes place requires significant vessel capacity and support infrastructure, to withstand long periods of operation at sea and to cope with the variable weather and environmental conditions. Such as, huge tidal movements of up to 15m which occur twice a day, and the severe cyclone threat that constantly occur in this region.

Since the mid 1950's the industry has focused on the production of pearls and has built an enviable reputation as the world's leader in the production of the highest quality pearls.

The pearling industry is unique in Australia in that it maintains a live animal, in a marine environment, to produce a 'gem' for the worldwide jewellery and fashion trade, rather than an edible item such as chicken or fish. Pearls are not deemed a 'commodity' but a luxury item open to the vagaries of the discretionary spending of the world's gem trading industry competing directly with diamonds, opals, rubies and emeralds. Indeed pearls are considered as one of the world's precious gems.

Due to the flexible working methods that have developed throughout industry over many years and companies being committed to excellence, the Australian pearling industry has developed technical expertise and husbandry techniques that are unique from any other fishing based industry in Australia. These skills and experiences have been honed to such a point that each oyster can produce up to three pearls during its productive life, whilst pearling industries in other countries can generally achieve only one. This provides a significant economic advantage when comparing cost/return ratios per oyster and this advantage must be maintained to guarantee the ongoing viability of the Australian industry.

Pearl oyster catching/pearl production technology and working methods developed in Australia are ground breaking and goes a long way towards enabling operators to actively compete on the world stage against the very competitive cost structures in the economies of other major pearl producing countries such as Indonesia and China.

The Australian *P.maxima* pearl oyster industry has an enviable record for producing a high quality product which produces an annual export value of production of up to A\$250 million. The production requires significant infrastructure requirements and a demand for operational suppliers, hence the industry provides a significant benefit to regional economies if the usual practice of attributing economic multipliers to these figures were calculated.

Husbandry and oyster care is necessarily 7 days per week consistent with weather and environmental patterns which directly impact the pearl oyster. The industry operates across two time zones being WA and Northern Territory and in some of the most remote areas in the world. The remote nature of the industry requires operating in the harshness of a marine environment with only fly in/fly out (or vessel in/vessel out) transport, on-site accommodation in close quarters aboard large ships, requiring 24hr health and safety coverage. Staff accommodation / laundry / meals etc are all provided.

The spread of hours, the days of work and the work cycles required to maintain the necessary care for the successful husbandry of the pearl oyster are critical to the sustainability and viability of the industry. Again, due to the methods of production and the varied labour skills required for each and every task, hours worked may be at times be punctuated with periods of breaks, depending on the time of the season, the weather, unforeseen events and the operational requirements at the time. We think it is paramount that the Commission understands this industry is anything but a straightforward 9.00am to 5.00pm Monday to Friday job where you return home each and every night. The industry requires multi skilled and specifically skilled labour round the clock 365 days of the year..

Each company is highly integrated across the several stages of the pearling process – from catching, transport, seeding, husbandry, harvesting, and selling. These stages of the industry process are directly dictated by the weather and environmental conditions which have a significant effect on the live pearl oysters. Slight changes in water temperature can express themselves in a short window of opportunity to seed or harvest pearl oysters and staff must be multiskilled to change quickly from one mode of activity to another in a matter of days.

The result has been high employment retention rates, and a consistent growth in the work force. The industry now generates around 800 direct jobs, the majority of which are multi skilled and specifically skilled to meet the requirements of the several stages of operation within the industry throughout the year – eg diving, skippers, seeding technicians, researchers, pearl graders and pilots. This requires the industry to maintain maximum flexibility in working conditions to maximise the immediacy of action necessary to manage live pearl oysters.

Yours Sincerely,



Brett McCallum
Executive Officer

Operator of Steam Raising Equipment means an employee capable of supplying and controlling steam required for retort process and who is appropriately qualified.

Retort Operator means an employee capable of setting up and operating a retort to a scheduled process.

Routine Maintenance Operator means an employee capable of performing routine maintenance of plant and equipment and who in addition is capable of performing some minor fabrication work.

Section Supervisor means an employee capable of supervising a multiple of processing lines and who is directly answerable to the production supervisor.

Single Line Supervisor means an employee capable of supervising a single processing section or table and who is directly answerable to the section supervisor.

Leading hand means an employee who is required to supervise, direct or be in charge of another employee or employees.

NES means National Employment Standards

Standard rate means the minimum wage for the tradesperson classification in clause 14.1 Division A.

- 3.2 Where this award refers to a condition of employment provided for in the NES the reference is to the condition as defined in the NES.

4 Application

- 4.1 This industry award applies throughout Australia to employers in the Producing and Processing of Fish, Aquaculture and Marine Products including fish purse seining or polling, fish farming, marine farming, aquaculture, pisciculture, mariculture, cultivation of live sea and freshwater products, breeding or spawning of fish and hatching of fish or marine products whether in or from the sea, rivers, dams, tanks, ponds, underwater cages, aquariums or other water source, holding, containing, penning, or harvesting of live fish or marine products or marine vegetation, cleaning, purging, flushing, packing, freezing, processing, preserving, smoking, treatment of fish or marine products, cultivation, culling or treatment of live shellfish including marine farming of oysters, mussels, clams, scallops and abalone to the exclusion of any other modern award. However, the award does not apply to an employee excluded from award coverage by the Act.

- 4.2 The award is binding on employers and employees to whom it applies but does not bind an employer who is bound by an enterprise award in respect of an employee to whom the enterprise award applies.

- 4.3 Where an employer is engaged in more than one industry to which an industry award applies an employee of that employer will be deemed to be in the classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work, regardless of the industry award in which the classification appears.

5 Access to the Award

The employer must ensure a copy of this award is accessible to all employees to whom it applies either on a noticeboard which is conveniently located at or near the workplace or

**Extract from Hearings on the Aquaculture Modern Award – 14 August 2009
PN 28-44. Commissioner Lewin and Mr Costa of the Australian Workers Union
(AWU), the only union making submissions on the proposed Aquaculture Award.**

“THE COMMISSIONER: That might be a convenient time to ask a question What do you perceive to be the aquaculture industry? It seems to me it’s cultivation isn’t it?

MR COSTA: That’s right Commissioner.

THE COMMISSIONER: All right. Well if that’s the case your draft would recognise it. I’ve read your draft and, in particular, the scope of the industry which is identified in the draft. It seems not to cover wild catch fishing.

MR COSTA: No, it doesn’t. And we concede that wild catch fishing has never been award covered. We don’t oppose the submissions of the employers in regard to wild catch fishing and we have not - - -

THE COMMISSIONER: You don’t propose a modern award to cover wild catch fishing?

MR COSTA: No, we don’t Commissioner.

THE COMMISSIONER: Do you concede that wild cat (sic) fishing has not been covered by a NAPSA in the past and there’s no federal award?

MR COSTA: That’s right, Commissioner, that’s our understanding of the situation.

THE COMMISSIONER: So in a way, without being conclusive about it, your submission based on R2 of the amended Request tends to therefore exclude wild catch fishing?

MR COSTA: That’s our understanding of the Request.

THE COMMISSIONER: Because there is no previous regulation?

MR COSTA: Yes, because there hasn’t been any award coverage for that, for employees of that type of industry and so we only sought to cover - - -

THE COMMISSIONER: In any form?

MR COSTA: In any form.

THE COMMISSIONER: All right. Well, the wild catch fishing organisations severally have filed submissions which seem to be in harmony with your perspective on that industry. You have that I imagine, Mr Costa.

MR COSTA: Yes, we have, correct.

THE COMMISSIONER: All right, please proceed."

End

Attachment Four

Aquaculture

19. We publish an exposure draft of the Aquaculture Industry Award 2010. The industry is currently subject to very limited regulation. There are three NAPSAs and the industry has not been subject to a federal award to date. Consequently, significant components of the industry would be subject to regulation for the first time in the event that a modern aquaculture industry award were to be made. The industry associations have made submissions that we should consider the industry as historically and traditionally award free and therefore no modern award should be made. We have not finally determined this question.
20. Three options arise from the consultations. One is to make a modern award for the industry after having considered responses to the exposure draft. Another is to provide that the industry will be subject to the Miscellaneous Award 2010 currently under consideration as part of Stage 4. If the industry associations' submissions were to be upheld in full the industry would be wholly award free. While we have decided to publish an exposure draft the other options have not been excluded.
21. It is also relevant to note that only the Australian Workers' Union (AWU) filed a draft award and the Commission did not therefore have the benefit of a draft award from the employers or industry associations for comparative drafting purposes. Given that we have yet to decide whether or not a modern award will be made and if so in what form, and that we will have regard to responses to the exposure draft, it would be of assistance to us if the employers and industry associations could give consideration to the form and contents of a modern aquaculture industry award which should be made in the event that we decide to make one.

Attachment 5

Aquaculture

Aquaculture Industry Award 2010

[17] We have decided to make an award which is in similar terms to the exposure draft. We have made some significant alterations in response to the submissions of the National Aquaculture Industry Council (AIC). We have altered the coverage provisions to exclude hatchery work and have therefore removed the corresponding classifications, descriptors and wage rates which were contained in the exposure draft. We have also added to the coverage provisions work performed by employees within the remaining classifications which is done for the initial preparation of aquaculture products for market.

[18] We have reformatted the classification structure and adopted the wage rates and wages structure proposed by the AIC. With the exception of the deletion of the hatchery classifications referred to above, the resulting classifications descriptors and wage rates have substantial similarity with those proposed by the Australian Workers' Union (AWU) which we included, albeit in a different format, in the exposure draft. The hours provisions of the award now provide that ordinary hours may be averaged over a period of 12 weeks.

[19] We also note that the alterations to the coverage of the *Miscellaneous Award 2010* should ensure that that award will not cover those parts of the aquaculture and fishing industries which have not previously been covered by awards and which are not covered by the *Aquaculture Award 2010*.

Attachment 6

Miscellaneous award

Miscellaneous Award 2010

[146] The principal issue in relation to the *Miscellaneous Award 2010* (Miscellaneous Award) is its coverage. The relevant paragraph of the consolidated request reads:

“4A. The Commission is to create a modern award to cover employees who are not covered by another modern award and who perform work of a similar nature to that which has historically been regulated by awards (including State awards). The Commission is to identify this award as such. This modern award is not to cover those classes of employees, such as managerial employees, who, because of the nature or seniority of their role, have not traditionally been covered by awards. The modern award may deal with the full range of matters able to be dealt with by any modern award however the Commission must ensure that the award deals with minimum wages and meal breaks and any necessary ancillary or incidental provisions about NES entitlements.”

[147] Paragraph 2 of the consolidated request contains a number of principles or guidelines which are relevant. We note in particular paragraph 2(a):

“2. The creation of modern awards is not intended to:

(a) extend award coverage to those classes of employees, such as managerial employees, who, because of the nature or seniority of their role, have traditionally been award free. This does not preclude the extension of modern award coverage to new industries or new occupations where the work performed by employees in those industries or occupations is of a similar nature to work that has historically been regulated by awards (including State awards) in Australia;

... ..”

[148] Several parties also drew our attention to s.143(7) of the Fair Work Act:

“143 Coverage terms

Employees not traditionally covered by awards etc.

... ..

(7) A modern award must not be expressed to cover classes of employees:

(a) who, because of the nature or seniority of their role, have traditionally not been covered by awards (whether made under laws of the Commonwealth or the States);
or

(b) who perform work that is not of a similar nature to work that has traditionally been regulated by such awards.”

[149] Although s.143(7) does not come into operation until 1 January 2010 it is clearly relevant to the coverage of modern awards generally and the coverage of the Miscellaneous Award in particular. Common to all of the provisions we have set out is the requirement that awards should not cover employees who because of the nature or seniority of their roles have traditionally not been covered by awards. Many different approaches and drafting techniques were proposed to encapsulate that requirement. We note also the implication in paragraph 4A of the consolidated request that an award should be created to cover employees not covered by another modern award and who perform work of a similar nature to that which has historically been regulated by awards.

[150] A number of submissions canvassed the purpose or function of the award. The ACTU, for example, submitted that the functions of the award should be twofold. The first is to fill gaps in modern award coverage which became apparent during the process of setting aside award-based transitional instruments as required by the Transitional Act.³⁸ The second function is to provide interim coverage for emerging industries pending the making of a new modern industry award or an appropriate extension to the coverage of an existing modern award. The Australian Government took a very similar approach, while stressing the importance to the economy of ensuring that employees who have not traditionally been covered by awards remain free from modern award coverage as well. In an earlier stage in the consultations ACCI proposed that the coverage of the award should not be settled until after an audit of modern award coverage to ascertain what if any gaps there are by comparison with the existing pattern of federal and state award coverage. AiGroup and ACCI both suggested that the award be limited to employees covered by a federal or state award or a Notional Agreement Preserving a State Award (NAPSA). AiGroup proposed in addition that industries and employers could be specified in a list attached to the award to permit new industries and employers to be added as necessary.

[151] Almost without exception employer representatives criticised the breadth of coverage in the exposure draft. They suggested that employees who have traditionally been excluded from award coverage, particularly professional and managerial employees, would be covered, including those deliberately excluded from modern award coverage in earlier stages of the modernisation process.

[152] We have considered all of the submissions and decided to include an additional paragraph in the coverage clause which more closely reflects the terms of the consolidated request and the Fair Work Act. The paragraph also contains some greater definition of the types of employees excluded. It reads:

“4.2 The award does not cover those classes of employees who, because of the nature or seniority of their role, have not traditionally been covered by awards including managerial employees and professional employees such as accountants and finance, marketing, legal, human resources, public relations and information technology specialists.”

Attachment 7

Coverage

4.1 This award covers employers throughout Australia in the ports, harbours and enclosed water vessels industry and their employees in the classifications listed in clause 13 to the exclusion of any other modern award. The award does not cover employers and employees wholly or substantially covered by the following awards:

(a) the *Maritime Offshore Oil and Gas Award 2010*;

(b) the *Seagoing Industry Award 2010*;

(c) the *Port Authorities Award 2010*;

(d) the *Dredging Industry Award 2010*;

(e) the *Stevedoring Industry Award 2010*;

(f) the *Marine Towing Award 2010*; and

(g) the *Marine Tourism and Charter Vessels Award 2010*.

For the purpose of clause 4.1, **ports, harbours and enclosed water vessels industry** means the operation of vessels of any type wholly or substantially within a port harbour or other body of water within the Australian coastline or at sea on activities not covered by the above awards.

4.2 The award does not cover maintenance contractors covered by the following awards:

(a) the *Manufacturing and Associated Industries and Occupations Award 2010*; or

(b) the *Electrical, Electronic and Communications Contracting Award 2010*.

4.3 The award does not cover employees of a local government covered by another award.

4.4 The award does not cover an employee excluded from award coverage by the Act.

4.5 The award does not cover employees who are covered by a modern enterprise award, or an enterprise instrument (within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth)*), or employers in relation to those employees.

4.6 The award does not cover employees who are covered by a State reference public sector modern award, or a State reference public sector transitional award (within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth)*), or employers in relation to those employees.

4.7 This award covers any employer which supplies labour on an on-hire basis in the industry set out in clause 4.1 in respect of on-hire employees in classifications covered by this award, and those on-hire employees, while engaged in the performance of work for a business in that industry. This subclause operates subject to the exclusions from coverage in this award.

4.8 Where an employer is covered by more than one award, an employee of that employer is covered by the award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work.

NOTE: Where there is no classification for a particular employee in this award it is possible that the employer and that employee are covered by an award with occupational coverage.

